In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-856

SOUTHERN CONCRETE COMPANY,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

JOHN H. BOONE,
Suite 420 Russ Building
235 Montgomery Street
San Francisco, California 94104
Attorney for Petitioner
Southern Concrete Company

JOHN V. SKINNER, JR.
EARL B. WILSON, JR.
SKINNER, WILSON, BEALS
& STRICKLAND
1210 Peachtree Center
Atlanta, Georgia 30303

A. MIMS WILKINSON, JR.
LAW OFFICES OF A. MIMS WILKINSON
1069 Spring Street, N.W.
Atlanta, Georgia 30309
Of Counsel

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Petitioner, Southern Concrete Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 19, 1976.

CITATION TO OPINIONS BELOW

The opinion of the District Court for the Northern District of Georgia granting partial summary judgment to Respondent is printed in Appendix B hereto and is reported at 394 F.Supp. 362. The opinion of the Court of Appeals which affirmed the judgment of the District Court for the Northern District of Georgia is printed in Appendix A hereto and is reported at 535 F.2d 313.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1976. The Court of Appeals denied Petitioner's Motion for Rehearing and Motion for Rehearing En Banc on September 24, 1976.

THE QUESTIONS PRESENTED

1. Whether a horizontal competitor of a recipient of loans extended in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, has standing under Section 4 of the Clayton Act, 15 U.S.C. 15, to recover damages caused by said violations.

2. Where a plaintiff proves an antitrust violation, causation in fact and damage, is there a further requirement under Section 4 of the Clayton Act requiring that the antitrust violation constituted a breach of a duty owed to the plaintiff, i.e., "standing".

a. If there is such a requirement, is the test one of determining the purpose of the antitrust prohibition or one of determining the necessary consequence of the Defendant's illegal acts.

b. If there is such a requirement and the test is one of determining the purpose of the antitrust prohibition, is horizontal competitor exclusion in the market for the tied product the only purpose of the antitrust prohibition against a credit-tie-in.

3. Where a plaintiff proves an antitrust violation, causation in fact and damage, is there a further requirement under Section 4 of the Clayton Act requiring that the causation be proximate.

a. If there is such a requirement, is the test of proximate cause correctly stated by the "target area" test, the "direct injury" test, the "area of the economy" test, the new tests of either the Sixth or Third Circuits or some other test.

4. Whether the issue of proximate cause should have been submitted to the jury and, in granting the motion for partial summary judgment, did the Trial Court deny petitioner's constitutional right to a trial by jury.

STATUTES INVOLVED

The statutory provisions involved are Section 1 of the Sherman Act, 15 U.S.C. §1, Section 4 of the Clayton Act, 15 U.S.C. §15 and U.S. Const. Amend. VII. These statutes are set out in Appendix C.

STATEMENT OF THE CASE

INTRODUCTION

This is a private antitrust case brought by Southern Concrete Company (a defunct Atlanta ready-mix company hereinafter referred to as "Southern") against United States Steel Corporation (a manufacturer of cement for sale to ready-mix producers in Atlanta hereinafter referred to as "U.S. Steel") and against Williams Brothers Concrete Company (another Atlanta ready-mix company hereinafter referred to as "Williams Brothers").

The basic facts upon which this case was brought were that U.S. Steel, stymied in its efforts at vertical integration by enforcement by the Federal Trade Commission blocking vertical mergers of cement and ready-mix companies, adopted a new technique of vertical integration, i.e., the loan of substantial sums of money to a puppet ready-mix company (Williams Brothers) with the understanding that Williams Brothers would purchase its cement from U.S. Steel.[1] By reason of the vast sums of money available to Williams Brothers from the deep pocket of U.S. Steel, Williams Brothers was able to enjoy substantial advantages over its competitors, including petitioner Southern Concrete Company. With the deep pocket

[1]The Federal Trade Commission later held this practice illegal, *In Re United States Steel Corp.*, Dkt. #8655, CCH Trade Reg. Rep. FTC Complaints, Orders & Stipulations, ¶ 20,139.

of U.S. Steel, Williams Brothers was able to acquire vast amounts of new equipment (trucks and plants), hire numerous salesmen, enjoy lower costs because of the new equipment and plants and lower interest rates, needed less cash for debt servicing, and, with lower costs, cut the price of ready-mix, resulting in the elimination of many producers including Southern. (Appendix on Appeal, pp. 168-183).[2]

THE FACTS OF THE CASE

Southern was organized in 1959 as a producer of ready-mix concrete. With an initial capitalization of $25,000, Southern started business with a small ready-mix concrete plant near Atlanta, Georgia. In 1961, Southern opened a second plant in downtown Atlanta. Southern's business was not immediately profitable and in early years moderate start-up losses were incurred. However, by 1964, Southern had turned the corner and made a moderate profit of $2,610. In 1965, the business was in full swing and enjoyed a profit of $87,764 (R. 2984-2985).

The Atlanta ready-mix market in 1965 was highly competitive with numerous small companies vying for

[2]Hereinafter the Appendix on Appeal will be cited as "App. p. ......", and Plaintiff's Exhibits not included in the Appendix on Appeal will be cited as "PX ......".

the available business. This competitive position is best illustrated by the following table:

Ready-Mix Companies	Annual Purchases Of Cement (in bbls.)	Ready-Mix* Produced and Sold (in cu. yds.)	% of Market
Whitley Concrete	350,000	497,500	28
Peavy Concrete	300,000	411,000	24
MacDougal Warren	225,000	308,250	18
Southern Concrete	100,000	137,000	8
Humphries Ready-Mix	65,000	89,000	5.2
D. B. Thornton	50,000	68,500	4
Jackson's Ready-Mix	50,000	68,500	4
East Side Lumber	35,000	47,950	2.8
Turner's Ready-Mix	30,000	41,100	2.4
College Park Ready-Mix	25,000	34,250	2
Harralson Concrete	20,000	27,400	1.6
Total	1,250,000	1,712,500	100

*On the average 1 barrel of cement is required to produce 1.37 cubic yards of ready-mix concrete.

The situation with regard to cement producers was equally competitive.

Cement Company	Cement Sold (in bbl.)	% of Market
Southern Concrete	262,500	21
Lehigh	236,250	18.9
Lone Star	215,000	17.2
Marquette	201,250	16.1
Signal Mountain	117,500	9.4
Penn-Dixie	90,000	7.2
U.S. Steel/UAC*	67,500	5.4
Giant	60,000	4.8
Total	1,250,000	100.

(Calculated from App. p. 238)

*UAC refers to the Universal Atlas Cement Company, a Division of U.S. Steel.

Unlike several other metropolitan ready-mix concrete markets, Atlanta had not been the target of the verti-

cal mergers by cement companies, which over the past several years had plagued other metropolitan ready-mix concrete markets. *See generally,* ECONOMIC REPORTS ON MERGERS AND VERTICAL INTEGRATION IN THE CEMENT INDUSTRY, pp. 91-111, 122-123 (FTC April, 1966).

The cement companies were not unaware of FTC enforcement attacks against such mergers. See generally, *In Re Martin-Marietta Co.,* FTC Dkt. #8280 (1961); *In Re Lone Star Cement Co.,* FTC Dkt. #8585 (1963); *In Re American Cement Corp.* C-681 (1964); *In Re Mississippi River Fuel Corp.,* FTC Dkt. #8657 (1965); *In Re National Portland Cement Co.,* FTC Dkt. #8654 (1965); *In Re Texas Industries, Inc.,* FTC Dkt. #8656 (1965); *In Re United States Steel Corp.,* FTC Dkt. #8655 (1965).

But, while Atlanta enjoyed the benefit of free competition and, with FTC enforcement activity, was protected from vertical integration, the seeds were being planted which would change this market.

At the end of 1964, another small family business, Williams Brothers Lumber Company, began seriously planning to enter the ready-mix concrete market. Having accumulated a small amount of capital ($100,000) and having banking connections from which they expected to obtain another $250,000 [$60,000 unsecured but endorsed by John Williams and $190,000 secured by ready-mix trucks] (App. p. 227), Williams Brothers planned to build a ready-mix plant in Chamblee, Georgia. It was estimated that the new plant would use approximately 75,000 barrels

of cement—an amount which would give them between 5.7 and 6 percent of the market. (App. p 233).[3]

This in itself would not have been unusual, nor would the state of competition in the Atlanta market have been changed. In a competitive market new entry is to be expected and encouraged. But far larger forces were at work which would dramatically change the market.

In September, 1974, U.S. Steel received word that Williams Brothers was contemplating a ready-mix plant and a U.S. Steel salesman began to solicit their business. (App. p. 268)

On December 15, 1974, the Regional Sales Manager of U.S. Steel reported:

> "It is our opinion the Trust Company of Georgia can be of definite help with this firm and we would appreciate the Treasury Department's assistance in this area." (App. pp. 221-222)

The next day the treasurer for U.S. Steel, David Adams III, wrote the Trust Company of Georgia (an Atlanta bank) requesting a good word (App. p. 223) and on December 28, 1964, the Trust Company of Georgia reported:

> ". . . the new operation will be operated on as little-paid-in capital as possible and any extended credit will be a factor in their selection of a supplier." (App. p. 225)

The sales department was quick to respond to this situation. The next day, December 29, 1964, the Regional Manager of Sales of U.S. Steel wrote the General Manager in New York:

[3]The 1964 total market was 1,250,000 barrels. If no growth is assumed, 75,000 barrels ÷ 1,250,000 = 6.0%. If a growth of 75,000 barrels in 1965 is assumed, 75,000 ÷ 1,325,000 = 5.66%.

> "It might be an excellent idea for Von Bevern and Raggio to give some thought to this to see what could be done in the way of placing us in a position to serve their requirements." (App. p. 226)

Both Mr. Von Bevern and Mr. Raggio were in the financial departments of U.S. Steel.

On January 8, 1965, the Regional Sales Manager again asked the Treasury Department to meet with the Williams Brothers, noting:

> "In my opinion this is the best opportunity we have had in a long time in the Atlanta market. We will be the sole supplier of a ready-mixed concrete producer which I believe will grow and expand. I am recommending that we comply with their request." (App. p. 230)

At this time, the Williams Brothers were requesting \$50,000 to \$75,000—the equivalent of 90 day credit terms. (App. pp. 227-228)

The sales motivation of this transaction was not lost on the finance people. On January 8, 1975, Mr. Von Bevern wrote Mr. Raggio:

> "I believe this will constitute a highly desirable outlet for our new Atlanta facility [a cement terminal] and that we should act positively and promptly on this request." (App. pp. 231-232)

The following proposal was suggested:

1. The Trust Company of Georgia would loan Williams Brothers \$375,000, simple interest at 4½%, pay-

able in five years, minimum payments of $50,000 with the balance at the end of the term. (App. 235)

2. U.S. Steel would make arrangements for the loan and would guarantee payment. "In such a manner the bank would relieve Williams Brothers and the individuals of their liability, substituting the credit standing of U. S. Steel Corporation." (App. p. 236)

3. U. S. Steel would receive an option to purchase the concrete company in the event the Williams Brothers should decide to sell the company. (App. p. 236).

In the proposal it was made clear that the purpose of the loan was to capture a large part of the Atlanta ready-mix business. The president of U. S. Steel wrote:

> "This proposal is a must from a commercial and business standpoint and represents the only present opportunity for UAC to increase its market participation in the expanding Atlanta market." (App. p. 244)

On February 23, 1965, the proposal was submitted to the U. S. Steel Board of Directors and a resolution was passed authorizing the transaction on either a direct loan or a guarantee basis. (App. p. 245)

Mr. Raggio then went to Atlanta to present the package to Williams Brothers. On March 2, 1965, Mr. Raggio explained to the Southern Sales Manager that while the Board of Directors had approved either a direct loan or a guarantee, he preferred to sell the Williams Brothers on the guarantee.

> "Prior to the meeting, Mr. Raggio explained to me his desire to sell a right of first refusal and a fully collateralized loan of 4½% with the Bank holding all papers. We simply endorsed for the Bank and would not be shown making any loans to Williams Brothers, and I felt that was an excellent idea." (App. p. 246)

Having reached an agreement with Williams Brothers, the papers were executed. (App. pp. 249-257; 259; 267)

At this point the agreement was clear. U.S. Steel agreed to loan money to Williams Brothers and Williams Brothers agreed to buy cement from UAC. As Mr. Evans, an officer of the Trust Company of Georgia, testified:

> "Q. Now did any officer or employee of U.S. Steel ever tell you why they were willing to guarantee this $275,000 loan?
>
> A. *They were willing to do it in order to sell cement to Williams Brothers Concrete Company.*
>
> * * *
>
> Q. Did anyone with Williams Brothers ever express this information to you?
>
> A. Yes, sir." (App. p. 305-307) (Emphasis added)

While this was the first illegal effort of U.S. Steel to vertically integrate into the Atlanta market, all that had been done was to finance a new ready-mix competitor. If nothing else had occurred, the Atlanta market in all probability would have continued as a competitive market of small companies, and Peti-

tioner as well as several other ready-mix producers, would still be in business.

But U.S. Steel did not stop with doubling its cement sales. Avarice was too compelling. 75,000 barrels were good but 300,000 barrels were even better. The way was clear—more U.S. Steel investment into the Atlanta ready-mix market. And, the vehicle had the safety of avoiding an FTC attack because it avoided the obviousness of vertical mergers.

As early as the time of the first loan closing, Williams Brothers had expressed their willingness to undertake further expansion with U.S. Steel's money. (App. p. 246)

On September 9, 1965, the Southern Sales Manager for U.S. Steel wrote a "private" memorandum to the UAC General Sales Manager:

> "In talking with Kirby Ward the other day, he said they were thinking of a one million dollar plant to be built next year, and this is the amount, I am sure, that they will be talking about when we see them in November.
>
> I believe it would be a good idea to discuss this matter with Mr. Raggio in the meantime so that he can be prepared." (PX 43)

The plans of U.S. Steel and Williams Brothers were worked out in the next two months, and on November 16, 1965, the President of UAC sought U.S. Steel's approval of a total loan of $1,300,000.

The purpose of the loan was to sell cement.

> "Since commencing operations on March 1965 through October, the company has purchased 90,000 barrels of cement. Its purchases of UAC cement during this period amounted to 76,000 barrels—approximately 85% of requirements. The company represents a potential outlet of 200,000 to 300,000 barrels to UAC in the next three years, with over 500,000 barrels projected within five years." (PX 43)

The papers were prepared and U.S. Steel guaranteed an $800,000 loan from the Trust Company of Georgia at 5½% for 10 years. (App. pp. 273-275; 276-283. In addition, U.S. Steel received a 10-year right of first refusal to purchase the stock of Williams Brothers Concrete.

This investment by U.S. Steel in the Atlanta market was unprecedented. It was to have a devastating effect on competition as well as on competitors. No ready-mix concrete company had ever entered the Atlanta market with 1 and ¼ million dollars backing from a cement supplier. In the following two years, U.S. Steel would further intensify this situation by guaranteeing an additional loan of $100,000 at ½% over the prime interest rate for five years. (App. pp. 286, 287-289), and by making a direct U.S. Steel loan of $150,000 at ½% over the prime interest rate for five years. (App. pp. 294-296)

It cannot be said that Williams Brothers could have procured such favorable financing from other sources. As the affidavit of Walter Dobbins, the President of Southern Concrete, states, most of the other ready-mix producers were paying 12 to 14 percent interest on their loans and were required to repay

their loans in a shorter period of time—generally in less than 5 years. (App. pp. 171-173) This statement is supported by the fact that the Trust Company of Georgia, without a U.S. Steel guarantee, offered only short term credit to Williams Brothers. (App. p. 284)

The effect of these loans on the growth of Williams Brothers and on the Atlanta ready-mix concrete market was phenomenal. The cement shipments of U.S. Steel to Williams Brothers illustrates the growth of Williams Brothers:

Year	BBL Cement
1965	107,000
1966	266,000
1967	379,000
1968	440,000

(PX 149)

The 1968 U.S. Steel sales of cement to Williams Brothers represented approximately 80% of their total purchases of cement. (PX 151) In 1965, U.S. Steel had 85% of Williams Brothers total cement purchases. (PX 43, p. 2) Accordingly, the total cement purchases and ready-mix concrete sales (assuming 80%) for Williams Brothers were:

Year	Purchases (BBL)[1]	Sold (cu yd.)[2]
1965	133,750	183,238
1966	332,500	455,525
1967	473,750	647,037
1968	550,000	753,500

[1]UAC bbl. sold × 1.25 = total cement purchased.
[2]Cement purchased × 1.37 = cu. yd. cement sold.

The evidence further indicates that the Atlanta consumption of ready-mix was relatively stable in the years 1964 through 1969 [1,712,500 cu. yd. in 1964 and 1,659,328 cu. yds. in 1969]. (App. p. 297) Assuming a 1,700,000 cubic yard market, Williams Brothers' percent of the available business grew as follows:

Year	Market Share
1964	0%
1965	10.78%
1966	20. 8%
1967	38. 2%
1968	44. 2%

Nor was this growth the result of anything but U.S. Steel's money. As the U.S. Steel Administrative Vice President and Treasurer said after infusion of $1,225,000 in 1966:

> "[t]hey still are dealing in the cement business with other people's money." (App. p. 285)

In October, 1967, Mr. Raggio said Williams Brothers

> "was securing about 40% of the Atlanta concrete market." (App. p. 292), and wrote:
>
> "Other major producers are unhappy over the fact that Williams Bros. have closed most of the important orders for the past year. The recent price list trends reflect their attitude." (App. p. 290)

As explained in the affidavit of Walter Dobbins, this financing gave Williams Brothers an advantage in both costs and cash flow which was not available

to other ready-mix concrete producers. (App. p. 171-174). The ultimate effect of the U.S. Steel-Williams Brothers relationship was that Williams Brothers, as the price leader, was able to price other ready-mix concrete producers out of the market. As a result, Southern and several other concrete producers were forced out of the market.

THE LITIGATION

On the preceding facts it was obvious that the heart of Petitioner's case was the tying arrangement violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, as this Court declared in *Fortner Enterprises v. United States Steel Corp.,* 394 U.S. 495 (1969).

Southern also charged the defendants with a violation of Section 7 of the Clayton Act (because of U.S. Steel's right of first refusal to purchase Williams Brothers Concrete), Section 3 of the Clayton Act (exclusive dealing arrangement), Section 2 of the Clayton Act, as amended, by the Robinson-Patman Act (discrimination), Section 2 of the Sherman Act (attempt and conspiracy to monopolize and monopolization) and Section 1 of the Sherman Act (exclusive dealing and reciprocity). Southern settled its claims against Williams Brothers and an order of dismissal was subsequently entered.

Prior to trial U.S. Steel made a motion for partial summary judgment which the District Court granted insofar as Southern's claims of tying, reciprocal deal-

ing and exclusive dealing were concerned.[4] This ruling of the District Court fatally crippled Petitioner's case; yet, because of the final order rule Southern Concrete was forced to trial. As a result of the partial summary judgment, the jury was never informed during the course of the trial that if they found that U.S. Steel had sufficient economic power with respect to credit to appreciably restrain free competition in the sale of ready-mix cement and if a not insubstantial amount of interstate commerce was affected, then the loans of U.S. Steel to Williams Brothers, on the understanding that Williams Bros. purchase cement from U.S. Steel, were per se illegal and in violation of Section 1 of the Sherman Act. As this Court said in *Fortner Enterprises v. U.S. Steel Corp.,* 394 U.S. 495 (1969):

> ". . . Although money is a fungible commodity—like wheat or, for that matter, unfinished steel—credit markets, like other markets, are often imperfect, and it is easy to see how a big company with vast sums of money in its treasury could wield very substantial power in a credit market. Where this is true, tie-ins involving credit can cause all the evils that the antitrust laws have always been intended to prevent, crippling other companies that are equally, if not more, efficient in producing their own products. . . ." 394 U.S. at 509.

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[4]The District Court also dismissed Petitioner's Section 7 of the Clayton Act claim, holding the right of first refusal did not constitute a merger or acquisition. Southern did not press this claim nor the claim of Robinson-Patman discrimination.

Equally important, the jury, without the knowledge that U.S. Steel's credit tie was per se illegal, was denied an important aid in determining whether U.S. Steel had the requisite intent to violate Section 2 of the Sherman Act. As this Court said in *U.S. v. Griffith Amusement Co.,* 334 U.S. 100, 106 (1948):

> "[A Defendant] usually does not violate Section 2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under Section 1. For those things which are condemned by Section 2 are in large measure merely the end products of conduct which violates Section 1."

Similarly, the Fifth Circuit has held that evidence that a defendant dairy cooperative association had engaged in boycotts illegal under Section 1 of the Sherman Act was evidence from which a jury could find an attempt to monopolize in violation of Section 2 of the Sherman Act. *North Texas Producers Association v. Metzger Dairies, Inc.,* 348 F.2d 189 (5th Cir. 1965).

In moving for partial summary judgment, U.S. Steel assumed, *arguendo,* that its practices with regard to the loans of money to Williams Brothers were violations of Section 1 of the Sherman Act as illegal tying or reciprocal dealing arrangements. Nevertheless, the District Court held as a matter of law that only competitors of U.S. Steel in the sale of cement, or Williams Brothers, had standing to sue for damages sustained as a result of the illegal credit tie. This ruling cut the heart out of the both Southern's Section 1 case and the Section 2 case. Consequently, Southern had to proceed to trial and the jury returned the verdict for U.S. Steel.

Southern then appealed the partial summary judgment to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the District Court and in doing so affirmed a rule which is contrary to the rule in other circuits and which will seriously undermine the effectiveness of private enforcement of the antitrust laws. According to the rule adopted by the Fifth Circuit in this case, a private plaintiff must not only show that he is within the sector of the economy in which there was a threatened breakdown of competitive conditions, but also that each specific antitrust prohibition has as an intended purpose which is the prevention of the type of injury sustained by the plaintiff. This result obtains because the Court went on to hold that the Petitioner lacked standing because the only reason for the prohibition against tying arrangements was the exclusion of other cement sellers and protection of the tied buyer.

REASONS FOR GRANTING THE WRIT

I

SUMMARY

By holding as a matter of law that Southern lacked standing to recover damages sustained because of U.S. Steel's use of a credit tie to create a puppet competitor, the Court of Appeals has seriously

threatened the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States.

In a similar situation this Court said:

> "Because these rulings by the Court of Appeals [holding in *pari delicto* a defense to a private action] seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari." *Perma-Life Mufflers, Inc. v. International Parts Corp.,* 392 U. S. 134, 136 (1968).

The rule of standing adopted in the instant case goes far beyond the requirements imposed by any other Circuit Court decision. If unreviewed, this decision will create a dangerous anomaly in the law, confusingly conflicting with opinions of other Courts and of this Court, and it will be an open invitation to the predatory use of deep pocket vertical integration through the flagrant implementation of the credit tie.

This case arises in the context of a credit tie, an issue which this Court has now pending for consideration in *Fortner Enterprises, Inc. v. United States Steel Corp.,* Dkt. No. 75-853. It also raises two issues of importance from the standpoint of effective antitrust enforcement. These issues are:

1. Is there a "duty" concept inherent in Section 4 of the Clayton Act and, if so, what is it?

2. Is there a "proximate cause" concept inherent in Section 4 of the Clayton Act and, if so, what is it?

Both concepts mentioned above have resulted in extreme confusion and conflict among the Circuit Courts of Appeals. In a recent opinion, *Malamud v. Sinclair Oil Corp.,* 521 F.2d 1142 (6th Cir. 1975), the Sixth Circuit noted:

> "The question of a party's standing to sue under Section 4 of the Clayton Act has been and continues to be troublesome to the courts." 521 F.2d at 1146.

II

THE CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS REGARDING "STANDING" TO RECOVER DAMAGES UNDER SECTION 4 OF THE CLAYTON ACT

The "troublesome nature" of the questions raised by this petition for certiorari has resulted in confusing conflicts between the Circuits and in some cases within the Circuits. To cite some examples:

In the Ninth Circuit: There appears to be a test, sometimes referred to as the "target area" test, which is expressed in the following language:

> "He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Conference of Studio Unions v. Loew's Inc.,* 193 F.2d 51, 54-55 (9th Cir. 1951). *See also In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31,* 481 F.2d 122, 127-8 (9th Cir. 1973).

In *Karseal Corp. v. Richfield Oil Corp.,* 221 F.2d 358 (9th Cir. 1955), the Court said,

U.S. 1, 5-6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). The seller uses his leverage in the market for the tying product in order to gain an advantage in the tied market. *Id.* Thus, the buyer is "coerced" into agreeing to take a product he does not want in order to obtain an article he desires, United States v. Loew's, Inc., 371 U.S. 38, 45, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962); and the result is that competing sellers in the tied market are "foreclosed" by the tie-in and competition "on the merits" in the tied product is prevented. *Id.;* Times Picayune Publishing Co. v. United States, 345 U.S. 594, 605, 73 S.Ct. 872, 97 L.Ed. 1277 (1953).[5] Thus, the Supreme Court cases make clear that the area of the economy in which a tying arrangement threatens a breakdown of competitive conditions is the market for the tied product and that those who would be proximately injured by such an arrangement would be the purchasers[6] of the tied product and the sellers of the tied product in competition with the seller who imposes the tie-in. Similarly, where in an exclusive dealing arrangement a party binds himself to purchase a product only from a certain seller, he is foreclosed from obtaining the product at a lower price or of higher quality from other sellers. Thus, competition as to the product is threatened and the purchaser and other sellers of the

[5]In Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969), the Supreme Court held that an extension of credit by a subsidiary of a manufacturing company conditioned on the borrower's promise to purchase the product of the parent company could amount to an illegal tie-in.

[6]*See* note 13, *infra.*

product are injured. A similar analysis applied to a reciprocal dealing arrangement leads to a conclusion that purchasers of the products which are the subject of the arrangement and the competitors for the sale of such products are the injured parties and competition as to such products is foreclosed.

[6] In the instant case, the tying arrangement[7] was the extension of direct and indirect loans (the tying product) by U.S.S. to Williams Brothers conditioned on the purchase from U.S.S. of cement (the tied product) by Williams Brothers.[8] Similarly, the challenged reciprocal dealing arrangement[9] involves U.S.S.'s guaranteeing of a loan and/or U.S.S.'s providing the services of Mr. Millhouse to Williams Brothers in return for purchase of cement by Williams Brothers from U.S.S. The exclusive dealing violation[10] arises from the sale of cement on the condi-

[7]For purposes of this motion U.S.S. assumes arguendo that the arrangement as to credit and cement purchases from U.S.S. by Williams Brothers could be termed a tying, exclusive dealing, or reciprocal dealing arrangement and that it is a violation of the antitrust laws. The court's reference to a tying, exclusive dealing or reciprocal dealing arrangement between these defendants is not, of course, a finding or conclusion that the arrangements between these defendants were such or violated the antitrust laws.

[8]See Counterstatement of Material Facts in plaintiff's brief in opposition at page 9: ". . . UAC was in full agreement with U.S.S.'s proposed 'tying arrangement' to secure a captive Atlanta market *for sale of UAC's cement product. . . .*" (Emphasis added.) It is important to note that in all the briefs submitted in connection with the motion, the parties assume that cement and ready-mix concrete are not one and the same, i.e. that they are not interchangeable, and that sellers of cement are not in competition with sellers of ready-mixed concrete. Thus, the relevant market for cement sales differs from the relevant market for ready-mixed concrete sales.

[9]*See* note 7, *supra.*

[10]*See* note 7, *supra.*

tion or understanding that the purchaser of cement would not use or deal in the cement of any other cement producer. In each of these arrangements the tied product or the product which is the subject of the agreement is cement. Thus, the area of the economy threatened with a breakdown of competitive conditions is cement sales and those who could claim to be proximately injured by such arrangements by U.S.S. are purchasers[11] of cement from U.S.S. pursuant to such an arrangement or competitors of U.S.S. in cement sales. Since plaintiff nowhere denies the assertions in U.S.S.'s Statement or Material Facts[12] that it did not purchase cement from U.S.S. during the relevant statute of limitations period,[13] and that it was never a seller of cement, as distinguished from ready-mixed concrete, in competition with U.S.S./U.A.C., the court finds that it does not compete in the area of the economy which would be threatened with a breakdown of competitive conditions by the challenged arrangements, cement sales, and further, finds that it would not be proximately injured by such arrangements. Thus, applying the test utilized in the Fifth Circuit to determine whether a party can allege to be injured "by reason of" an antitrust violation, and thus has standing to claim damages pursuant to § 4 of the Clayton Act for such antitrust violation, we find that Southern does not have standing to seek damages on account of the alleged tying, reciprocal dealing or exclusive dealing arrangements between U.S.S./U.A.C. and Williams Brothers with respect to U.S.S./U.A.C.'s sale of cement to Williams Brothers.

[11]*See* note 13, *infra*.

[12]Pursuant to Local Court R. 91.72 "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." We do not rely solely on the failure of Southern to controvert these assertions, however, as its brief makes clear that it does not contend that it purchased, directly or indirectly, cement from U.S.S./U.A.C. during the statute of limitations period, or that it was a manufacturer or seller of cement at any time.

[13]Since Southern does not allege that it was either a direct or indirect purchase of cement from U.S.S./U.A.C., the issue of whether an indirect purchaser, that is, a purchaser of the product at a subsequent level in the chain of distribution may recover for the alleged violations asserted herein is not presented. As a result, we need not and do not decide herein whether such indirect purchasers could claim to be proximately injured "by reason of" antitrust violations such as the one here in question.

[7] We reject the contention made by plaintiff that the question of causation is necessarily a question of fact which cannot be decided on a motion for summary judgment and must be submitted to the jury. Plaintiff's assertions of injury in its brief are general allegations of injury due to an alleged conspiracy between U.S.S. and Williams Brothers to restrain trade in and to monopolize the ready-mixed concrete market; it makes no attempt to specify injuries to it due to the alleged tying, exclusive dealing or reciprocal dealing arrangements. Further, as noted above, plaintiff has made no attempt to show that it was a seller of cement or a purchaser of cement from U.S.S./U.A.C. This fails to satisfy the burden imposed on a party opposing summary judgment. Rule 56(e), Fed.R.Civ.P. As stated in First Nat'l Bank v. Cities Service Co., *supra:*

> To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule

> 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations of their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Id. 391 U.S. at 289-90, 88 S.Ct. at 1593.

[8] The court also rejects plaintiff's contention that in *Terrell III, supra,* the Fifth Circuit Court of Appeals expanded the class of protected private plaintiffs by holding that a private right of action under § 4 of the Clayton Act should be recognized when the plaintiff makes a mere showing that defendants' alleged violation of the antitrust laws had "materially contributed" to plaintiff's injuries. The *Terrell III* opinion involved an appeal by the defendant from a trial on damages. Earlier in the action the district court judge, after a jury verdict in plaintiff's favor, had entered judgment on the verdict against this defendant and judgment notwithstanding the verdict in favor of the individual defendants. On defendant's (first) appeal a majority of the original panel in the Court of Appeals vacated the judgment against the defendant and remanded the case for a new trial. Household Goods Carriers' Bureau v. Terrell, 417

F.2d 47 (5th Cir. 1969). Upon rehearing en banc, a majority of the Court affirmed the district court's judgment against the defendant, but reversed for a new trial on the issue of damages. Household Goods Carriers' Bureau v. Terrell, 452 F.2d 152 (5th Cir. 1971) (en banc). In *Terrell III* the panel reviewed this subsequent trial on damages. That it did not intend to set forth a new test on standing nor deal with causation in fact is made perfectly clear in the *Terrell III* opinion; the Court emphasized that "the *en banc* decision establishing liability finally adjudicated the issue of causation" and that "the decision of this court sitting *en banc* at an earlier stage of this same case represents the law of the case." 494 F.2d at 19. The *Terrell III* Court was thus concerned with the measure of proof as to amount of damages rather than causation. As stated in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931) (and quoted in *Terrell III):*

> [T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes recovery of uncertain damages applies to such as are not the *certain* result of the wrong, not to those damages which are *definitely* attributable to the wrong and only uncertain in respect of their amount. (Emphasis added.)

See also Shumate & Co. v. National Ass'n of Securities Dealers, Inc., 509 F.2d 147, 153 (5th Cir. 1975)

("although [the Court is] generally lenient as to evidence required to show the amount of damages in antitrust matters once liability is determined, courts do not permit the fact of damage necessary to prove liability to be based on speculation."); Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 901-02 (5th Cir. 1973), cert. denied, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150.

The court's conclusion is that plaintiff does not have standing to claim damages on account of the tying, exclusive dealing or reciprocal dealing arrangements between U.S.S./U.A.C.; it is not a ruling on admissibility of evidence with respect to claims which are not foreclosed by this order, for example, the alleged conspiracy to restrain trade in or to monopolize the ready-mixed concrete and cement markets. *Cf.* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). Rulings on admissibility of evidence as distinguished from sufficiencies of claims, is best reserved for trial.

We hold that plaintiff lacks standing under § 4 of the Clayton Act to recover damages "by reason of" the alleged tying, exclusive dealing or reciprocal dealing arrangements between defendants U.S.S. and William Brothers. To that extent, this portion of the motion for partial summary judgment is granted.

B. *Alleged Conspiracy to Attempt to Monopolize*

[9] U.S.S. further seeks partial summary judgment on the ground that Southern cannot assert the claims that U.S.S. has violated § 2 of the Sherman

Act, by engaging in a "conspiracy to attempt to monopolize" the production and sale of both cement and ready-mixed concrete for the reason that such does not assert a violation of any law. Plaintiff opposes this portion of the summary judgment motion contending that its charged violation, "conspiracy to attempt to monopolize," is within the Congressional intention of § 2 of the Sherman Act and that the violation is distinguishable from the charge of attempt to monopolize in that it does not require the showing of specific intent, but, rather is established upon commission of predatory acts pursuant to the alleged conspiracy to monopolize.

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine and conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.

The court agrees with defendant U.S.S. that three distinct offenses are to be found in this provision: (1) monopolization, (2) attempt to monopolize, and (3) combination or conspiracy to monopolize. Plaintiff's contention that in United States v. Dunham Concrete Prod., Inc., 501 F.2d 80 (5th Cir. 1974), the Fifth Circuit Court of Appeals recognized the crime of a

conspiracy to attempt to monopolize "by failing to hold that its inclusion in the lower Court's charges to a jury was reversible error" is totally without merit. *Dunham* involved an appeal from an order granting a new trial pursuant to 28 U.S.C. § 2255. The court held that the submission to the jury of a form for recording their verdict[14] which listed as separate counts "Conspiracy to attempt to monopolize in violation of Section 2 of the Sherman Act" and "Conspiracy to attempt to extort", which form had been prepared by counsel for defendant, did not warrant relief from judgment pursuant to § 2255. Accordingly, it reversed the trial court as to this portion of its order. The Court's reversal was not based on a finding that there is a separate crime of "conspiracy to attempt to monopolize" in § 2 of the Sherman Act. It was based on the finding that the *"error* in wording of this form for recording the verdict did not contribute to [the] conviction." *Id.* at 84 (emphasis added).[15] It further mentioned that when Government counsel objected to the form, "[u]naccountably" the court adopted it as presented and sent it out with the jury. There is nothing in the opinion to suggest

[14]It is clear from the opinion that the phrase "conspiracy to attempt to . . ." appeared twice on the form for recording the jury verdict; the charges to the jury were not the subject of the appeal.

[15]The Court stated that "conspiracy to attempt to monopolize" could have only four conceivable meanings: (A) conspiracy to monopolize, (B) conspiracy to fail to monopolize, (C) attempt to monopolize and (D) attempt to fail to monopolize. Since meanings B and D are *"nonsense"* and since the jury had been unable to agree as to the count which charged a conspiracy to monopolize (meaning A), the Court construed the verdict as finding an attempt to monopolize. *Id.* at 84.

that a separate offense exists for "conspiracy to attempt to monopolize"; the entire opinion indicates that no such crime exists.

Accordingly, insofar as U.S.S. seeks partial summary judgment on the claim that it conspired to attempt to monopolize the production and sale of cement or ready-mixed concrete in any geographic market, the motion is granted.

C. *Alleged Acquisition of Stock or Assets*

U.S.S. seeks summary judgment in its favor as to Southern's claim for damages for an alleged violation of § 7 of the Clayton Act, 15 U.S.C. § 18. The acquisition complained of is alleged to be the "acquisition" of Williams Brothers by U.S.S. The latter seeks summary judgment on this issue based on the allegations that it has never purchased, possessed, or otherwise acquired a single share of stock in Williams and that it has never purchased, possessed or otherwise acquired any asset of Williams. *See* U.S.S.'s Statement of Material Facts, No. 15 and 16. It argues that plaintiff's contention that the right of first refusal as to Williams Brothers' stock granted to U.S.S. and exercisable in the event of default on a loan made by Trust Company of Georgia to Williams Brothers and guaranteed by U.S.S., amounts to an "acquisition" of stock and assets is insufficient as a matter of law. U.S.S. further contends that even if viewed as an "acquisition" within the meaning of § 7 of the Clayton Act, plaintiff was not, and could not, have been damaged by such arrangement.

Plaintiff opposes this portion of the motion with the following contentions:

1. The circumstances surrounding the vertical financing and business arrangement existing between U.S.S. and Williams Brothers were tantamount to vertical integration (a supplier's acquisition of its customer) and as such indicate a probability that U.S.S. used and will continue to use its dominant guarantor's position as leverage to put pressure upon the debtor to substantially lessen competition in the Portland cement and ready-mixed concrete industries in the relevant geographic markets.
2. This vertical arrangement afforded Williams Brothers decisive cost advantages in these markets over its nonintegrated competition, such as Southern in the purchase of the costliest concrete ingredient, Portland cement, which advantages when passed on in the form of lower concrete prices to consumers resulted in prices lower than Southern's costs, ultimately forced Southern out of business in October, 1969.

It contends that U.S.S.'s "undue influence" over Williams Brothers of the "collateral security option to purchase Williams Brothers' outstanding stock" is an "acquisition" within the meaning of § 7. It argues that this arrangement is ipso facto violative of § 7, but if the court is "not disposed" to enter such a determination, it is "critical" that the term "acquisition", as used in § 7, "encompasses such coercive loan arrangements and its anticompetitiveness is reserved

for jury deliberation." Plaintiff stresses that "summary judgment is manifestly inappropirate on the issues of intent and state of mind necessarily raised by inquiry into the circumstances surrounding the creation and operation of this vertical combination." Both parties to this motion rely on Metro-Goldwyn-Mayer v. Transamerica Corp., 303 F.Supp. 1344 (S.D. N.Y.1969) (hereinafter "MGM") in support of their contentions.

[10] Section 7 of the Clayton Act, 15 U.S.C. § 18, provides, in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . .

There can be a claim for money damages, pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, for a violation of § 7 of the Clayton Act. Dailey v. Quality School Plan, Inc., *supra;* Gottesman v. General Motors Corp., 414 F.2d 956, 961 (2d Cir. 1969). *See* Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 381, 85 S.Ct. 1473, 14 L.Ed. 2d 405 (1965).

[11, 12] A claim for damages for violation of § 7 presents the questions of whether there has been an acquisition of stock or assets within the meaning

of § 7; if so, whether plaintiff can claim damages on account of such acquisition; what is the appropriate section of the country; and whether there is a reasonable probability of a substantial lessening of competition. Where there is no "acquisition" of stock or assets, therefore, the other questions need not be answered and a claim for damages will not lie. *See infra,* at note 7 and accompanying text. The words "acquire" and "assets" are not terms of art or technical legal language; they are generic, imprecise terms encompassing a broad spectrum of transactions whereby the acquiring party may accomplish the acquisition by means of purchase, assignment, lease, license, or other otherwise. United States v. Columbia Pictures Corp., 189 F.Supp. 153, 181-82 (S.D. N.Y. 1960).

In the instant case it is not in dispute that in 1965 and 1966 the Trust Company of Georgia (TCG) granted three loans to Williams Brothers. U.S.S. agreed with TCG that it would guarantee repayment of the loan in the event of default by Williams Brothers. These guarantees were secured by the right of first refusal to purchase stock of Williams Brothers, a right which was to remain effect only while there were outstanding balances on the loans.[16] Two of the loans have been repaid in full by Williams Brothers; and thus, the right of first refusal in the event of default on these loans no longer exists. The

[16]U.S.S. explains in its brief in support of its motion for partial summary judgment that the option to purchase stock would come into play only if Williams Brothers notified U.S.S. that a third party had offered to buy the Williams Brothers' stock.

guarantee with respect to the third loan has been withdrawn by U.S.S. *See* U.S.S.'s Statement of Material Facts, No. 11, 12, 13 and 14.

[13] It is clear that the right of first refusal in the event of default was never exercised and will never be exercised because such right is now nonexistent. Thus, U.S.S. never possessed, in any meaningful sense of the word, the stock of Williams Brothers. The court finds that characterizing the right of first refusal for the purchase of stock granted to a guarantor of a loan furnished by a third party as an "acquisition" within the purview of § 7 of the Clayton Act stretches the language of this section to absurd lengths and, further, that such characterization could have serious deleterious effects on the commercial transactions of corporations and lending institutions.

As both parties rely to some extent on *MGM, supra,* a short discussion of that opinion and a comparison to the situation here involved is appropriate. In the *MGM* case plaintiff M.G.M. sought to enjoin the defendants from proceeding with a cash tender offer by Tracy Investment Company for M.G.M. stock. 303 F.Supp. at 1346. The cash tender offer was being financed by Transamerica Financial Corporation, whose parent corporation Transamerica Corporation, owned 99.6% of United Artists Corporation, a major competitor of M.G.M. The court found that the acquisition by the Transamerica-United Artists group of working control of M.G.M. stock *"would* violate" § 7 of the Clayton Act, 303 F.Supp. at 1348 (em-

who is only *incidentally* injured by a violation of the antitrust laws,—the bystander who was hit but not aimed at—cannot recover against the violator." (emphasis added) 221 F.2d at 363

The rules of proximate cause as developed in tort law are based on concepts of intervening cause, superseding cause and foreseebility.

> "'Proximate cause' or 'legal cause' is the name given to the limitation which the courts have been compelled to place, as a practical necessity, upon the actor's responsibility for the consequences of his conduct. The limitation is nearly always a matter of various considerations of policy which have nothing to do with the fact of causation. The tendency of the courts to state these considerations in terms of causation often obscures the real issue involved." PROSSER, TORTS, § 47 p. 252 (2nd Ed. 1955).

A similar justification has been given for the "standing" rules in antitrust.

> "Instead of being merely a collection of technical rules and doctrines, 'standing' is basically the device by which a court determines whether the harm alleged by the plaintiff is of a type which is—or ought to be—entitled to judicial protection. After all, the chain of causation extends indefinitely from a given act; and once that chain is traced the real problem is determining the point where the chain should be cut off—where the line should be drawn—in imposing liability." Pollock, *Standing To Sue, Remoteness of Injury, and The Passing-On Doctrine,* 32 Antitrust L.J. 5, 9 (1966).

In application this test means nothing more than that a plaintiff's injuries (assuming causation in fact) were foreseen or foreseeable. In *Twentieth Century Fox Film Corp. v. Samuel Goldwyn,* 328 F.2d 190 (9th Cir. 1964), the test was expressed as follows:

> "[T]he plaintiff must show that whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." (emphasis added) 328 F.2d at 220.

Similarly, in the *Western Liquid Asphalt Cases,* the Ninth Circuit applied the foreseeability test in the following language:

> "We think that appellants here are clearly within the area of the economy which appellees reasonably *could have* or *did foresee* would be endangered by the breakdown of competitive conditions." *State of Alaska v. Standard Oil of California,* 487 F.2d 191, 199 (9th Cir. 1973).

This test is substantially the same as that prevalent in the general tort law of proximate cause where, assuming causation in fact, the rule has been that a defendant is responsible for all foreseeable consequences of its action. This is true whether there is a foreseeable intervening cause or not.

An intervening force has been defined as follows:

> "An intervening force is a force which is neither operating in the defendant's presence, nor at the place where the defendant's act takes effect at the time of the defendant's act, but

comes into effective operation at or before the time of damage." McLaughlin, *Proximate Cause,* 39 Harv. L. Rev. 149,159 (1925).

"An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." RESTATEMENT, SECOND, TORTS, § 441.

"An intervening cause is one which comes into active operation in producing the result after the negligence of the defendant." PROSSER, TORTS § 44 p. 271 (4th Ed. 1971)

While this Court recognized the limitations by the Circuit Courts in *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 263, n.14, and this Court may well wish to impose a requirement of proximate cause, effective antitrust policy suggests the conflicts among the Circuits be resolved in favor of the foreseeability analysis as the most appropriate test for standing.

CONCLUSION

The instant petition presents this Court with an opportunity to clarify and strengthen the nation's antitrust policy by bringing certainty to an area in which the Circuit Courts have floundered for years. This case presents the range of possible solutions and it arises in a context which could well be affected by this Court's decisions in *Fortner Enterprises, Inc. v. United States Steel Corp.,* Dkt. No. 75-853, *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.,* Dkt. No. 75-904 and *Illinois Brick Co. v. State of Illinois,* Dkt. No. 76-404.

For all the reasons stated above, Petitioner respectfully requests that the Writ of Certiorari issue.

Dated, December 17, 1976.

JOHN H. BOONE,
Attorney for Petitioner
Southern Concrete Company

JOHN V. SKINNER, JR.
EARL B. WILSON, JR.
SKINNER, WILSON,
BEALS & STRICKLAND

A. MIMS WILKINSON, JR.
LAW OFFICES OF A. MIMS WILKINSON
Of Counsel

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals,
Fifth Circuit.

Southern Concrete Company, Plaintiff-Appellant, vs. United States Steel Corporation, Defendant-Appellee.	No. 75-2987

Appeal from the United States District Court for the Northern District of Georgia

Before: GEWIN and AINSWORTH, Circuit Judges, and MARKEY,* Chief Judge.

GEWIN, Circuit Judge:

In this private antitrust suit Southern Concrete Company, plaintiff below, appeals from a partial grant of summary judgment in favor of defendant-appellee United States Steel Corporation. From the late 1950's until 1969 appellant Southern Concrete was engaged in the manufacture and sale of ready-mix concrete in the Atlanta metropolitan area; it is now defunct. Appellee United States Steel Corporation, through its Universal Atlas Cement Division (hereinafter United States Steel), is a supplier of cement, a major ingredient of ready-mix concrete, in

*Of the U. S. Court of Customs and Patent Appeals, sitting by designation.

the Atlanta area. In 1965 the principals of Williams Brothers Lumber Company, a building supplies business, decided to enter the expanding ready-mix concrete business in Atlanta. Upon learning this, United States Steel contacted Williams Brothers to solicit its business.

Thereafter, on three occasions from 1965 through 1967, an Atlanta bank, Trust Company of Georgia, loaned over $1.25 million to Williams Brothers on favorable terms; United States Steel agreed to serve as guarantor on each of Williams Brothers' three notes to the bank. These loan guarantees were secured by rights of first refusal to purchase the stock of Williams Brothers. These rights of first refusal remained in effect only while there were outstanding balances on the loans. Williams Brothers repaid each of the three loans, and United States Steel never acquired or purchased any Williams Brothers' stock. In addition, on one occasion in 1969 United States Steel made a direct loan to Williams Brothers, which the latter repaid. Williams Brothers bought almost all of its cement requirements from United States Steel. Southern Concrete did not purchase any cement from United States Steel within the period here involved and never manufactured or sold cement in competition with United States Steel. Williams Brothers' cement business prospered and expanded; Southern Concrete, on the other hand, went out of business in 1969.

In 1971 Southern Concrete instituted this antitrust action against both United States Steel and Williams

Brothers,[1] at whose feet Southern Concrete would lay the blame for its demise. The favorable financing which United States Steel had been able to arrange, Southern Concrete contended, had enabled Williams Brothers to undersell its competitors and force them out of business. The complaint set forth a plethora of alleged antitrust violations[2] by the two defendants including the following, the only claims involved in this appeal:

1. A tying arrangement violative of section 1 of the Sherman Act, 15 U.S.C. § 1. Southern Concrete alleged that United States Steel had granted loan guarantees (the alleged tying product) to Williams Brothers conditioned upon Williams Brothers' agreement to purchase cement (the alleged tied product).[3]

[1]Southern Concrete settled its claim against Williams Brothers on March 28, 1975, and an order dismissing Williams Brothers was subsequently entered.

[2]Discriminatory sales of cement to Williams Brothers; conspiracy to restrain trade in the production and sale of cement; conspiracy to restrain trade in the production and sale of ready-mix concrete; conspiracy to attempt to monopolize the production and sale of both cement and concrete in three separate geographic markets (the Atlanta area, the state of Georgia, and the southeastern United States), each constituting a distinct antitrust violation; conspiracy to monopolize production and sale of both cement and ready-mix concrete in the three market areas; attempt to monopolize the production and sale of both cement and ready-mix concrete in the three market areas; and an achieved monopoly in the production and sale of both cement and ready-mix concrete in the three market areas.

[3]*See Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969). In *Fortner* the Supreme Court found that the defendants, United States Steel and its wholly-owned subsidiary had engaged in an unlawful tying arrangement; the subsidiary had extended credit for purchasing land (the "tying product") on the condition that the steel company's prefabricated homes (the "tied product") be purchased for use on the land. *Fortner,* however, did not alter the requirements for standing to challenge an alleged tying agreement.

2. An exclusive dealing arrangement violative of section 3 of the Clayton Act, 15 U.S.C. § 14. Southern Concrete asserted that United States Steel had sold cement to Williams Brothers on the condition that Williams Brothers purchase all its cement requirements from United States Steel.

3. A reciprocal dealing arrangement violative of section 1 of the Sherman Act. Southern Concrete alleged that United States Steel had agreed to guarantee loans to Williams Brothers if the latter would agree to purchase cement.

4. A reciprocal dealing arrangement violative of section 1 of the Sherman Act. Southern Concrete alleged that United States Steel had agreed to provide Williams Brothers the services of one of its employees (a cement technician), if Williams Brothers would provide United States Steel with storage facilities.

After more than three years of discovery, United States Steel moved for partial summary judgment with respect to some of the claims asserted by Southern Concrete including, *inter alia,* the four aforementioned alleged violations of section 1 of the Sherman Act and section 3 of the Clayton Act. For purposes of this motion, and on this appeal, United States Steel assumes *arguendo* that the alleged violations had occurred; it argues, however, that Southern Concrete lacks standing under the provisions of section 4 of

the Clayton Act to assert these four claims. The trial court agreed and granted the motion for partial summary judgment on these claims. The exhaustive opinion of the district court is reported at 394 F.Supp. 362 (N.D.Ga.1975). On the bulk of its claims, however, Southern Concrete had a jury trial. After a trial lasting approximately three weeks, the jury found in favor of United States Steel and against Southern Concrete on every issue.[4] Southern Concrete has not appealed from the adverse jury findings. Rather, the only issue before us on this appeal is whether the court erred in granting United States Steel's motion for summary judgment on the four claims of recip-

[4]The case was submitted to the jury by way of special interrogatories. The jury found:

1. That United States Steel did not engage in a contract, combination, or conspiracy to restrain interstate trade in violation of Section 1 of the Sherman Act;
2. That United States Steel *did not monopolize* the manufacture, sale, and distribution of *cement* in the Atlanta metropolitan area in violation of Section 2 of the Sherman Act;
3. That United States Steel *did not attempt to monopolize* the manufacture, sale, and distribution of *cement* in the Atlanta metropolitan area in violation of Section 2 of the Sherman Act;
4. That United States Steel *did not combine or conspire to monopolize* the manufacture, sale, and distribution of *cement* in the Atlanta metropolitan area in violation of Section 2 of the Sherman Act;
5. That United States Steel *did not monopolize* the manufacture, sale, and distribution of *ready-mix concrete* in the Atlanta metropolitan area in violation of Section 2 of the Sherman Act;
6. That United States Steel *did not attempt to monopolize* the manufacture, sale, and distribution of *ready-mix concrete* in the Atlanta metropolitan area in violation of Section 2 of the Sherman Act;
7. That United States Steel *did not conspire to monopolize* the manufacture, sale, and distribution of *ready-mix concrete* in the Atlanta metropolitan area in violation of Section 2 of the Sherman Act.

rocal dealings, exclusive dealings, and a tying arrangement. We affirm.

[1] Section 4 of the Clayton Act, 15 U.S.C. § 15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . .

Although the statute contains no language of limitation, the Supreme Court has recognized that

> [t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.

Hawaii v. Standard Oil Co., 405 U.S. 251, 263, 92 S.Ct. 885, 891, 31 L.Ed.2d 184, 193 n. 14 (1973) (citations omitted). To establish that he has been injured "by reason of" an antitrust violation within the meaning of section 4, the private antitrust plaintiff must show that he was within the "target area" of the alleged violation. That is, he must "show himself within the sector of economy in which the violation threatened a breakdown of competitive conditions." *Jeffrey v. Southwestern Bell,* 518 F.2d 1129 (5th Cir. 1975); *Battle v. Liberty Nat'l Life Ins. Co.,* 493 F.2d 39, 49 (5th Cir. 1974), *cert. denied,* 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975); *Dailey v. Quality School Plan, Inc.,* 380 F.2d 484, 487 (5th Cir. 1967).

[2, 3] To determine whether a particular plaintiff meets the "target area" test for standing, it is necessary to examine the nature of the specific antitrust violations of which he complains and to ascertain what areas of the economy would be affected thereby. Southern Concrete alleged a tying agreement and reciprocal dealings violative of Section 1 of the Sherman Act, and exclusive dealings violative of Section 3 of the Clayton Act. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . ." *Northern Pac. Ry. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545, 550 (1958). The evil inherent in an illegal tie-in "is the fact that the agreement or the effect thereof lessens competition in the tied product." *David R. McGeorge Car Co. v. Leyland Motor Sales,* Inc., 504 F. 2d 52, 58 (4th Cir. 1974), *cert. denied,* 420 U.S. 992, 95 S.Ct. 1430, 43 L.Ed.2d 674 (1975). *See also Times Picayune Publishing Co. v. United States,* 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277, 1293 (1953) ("The common core of the adjudicated unlawful tying arrangement is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, *resulting in economic harm to competition in the 'tied' market."*) (emphasis added); *Wendkos v. ABC Consol. Corp.,* 379 F.Supp. 15, 17 (E.D.Pa.1974). The anti-competitive effects of tying agreements are two-fold: "they may force [the party subject to the tie] into giving up the purchase of substitutes for the tied product, . . . and they may de-

stroy the free access of competing suppliers of the tied product to the consuming market." *United States v. Loew's, Inc.,* 371 U.S. 38, 45, 83 S.Ct. 97, 102, 9 L.Ed.2d 11, 18 (1962). Consequently, the area of the economy threatened with a breakdown of competitive conditions because of a tying agreement is the market for the tied product; and those who will be proximately injured thereby—in addition to the party subject to the tie—are competitors in the tied product.

[4] In the case before us the alleged "tied" product is cement, which Williams Brothers was purportedly forced to buy from United States Steel. Southern Concrete did not sell cement; it sold ready-mix concrete. Moreover, Southern Concrete did not purchase cement from United States Steel. Thus, even if there did exist a tying agreement obligating Williams Brothers to buy cement from United States Steel, it neither restricted the market for Southern Concrete's product, ready-mix concrete, nor confined Southern Concrete's sources of supply for cement.

In *Holleb & Co. v. Produce Terminal Cold Storage Co.,* 5 CCH Trade Reg. Rep. ¶ 60,346 (N.D.Ill.1975), the court confronted an analogous situation. Holleb, a distributor of frozen foods, alleged that Produce Terminal, a competing distributor, had engaged in an illegal tying agreement by refusing to purchase the products of a frozen food producer that did not store its products in Produce Terminal's public frozen food warehouse facilities (the "tied product"). The court found no evidence of a tying agreement, but concluded that even if such an agreement did exist,

"it would not be an agreement of which the plaintiff could complain. . . . Were plaintiff engaged in the business of frozen food warehousing, it could complain of such an agreement, if it existed." *Id.* at 66,921. By the same token, had Southern Concrete been in the cement business and had the market for its product been restricted because a potential customer was required by a tying agreement to purchase all its cement requirements from a competitor, Southern Concrete might well have been injured "by reason of" the agreement within the meaning of Section 4; however, that simply is not the case.

[5, 6] This same type of analysis can be applied to the other types of antitrust violations alleged by Southern Concrete: reciprocal dealing and exclusive dealing. "Reciprocal dealing" generally involves the use of buying power to secure an advantage in the sale of one's products, *W. L. Gore & Assoc. v. Carlisle Corp.,* 381 F.Supp. 680, 702 (D.Del.1974), or an *inter se* agreement to purchase from each other between two parties who stand on equal footing with reference to purchasing power, *United States v. General Dynamics Corp.,* 258 F.Supp. 36, 59 (S.D.N.Y. 1966). It has been identified by the Supreme Court as an anticompetitive practice. *FTC v. Consolidated Foods Corp.,* 380 U.S. 592, 594, 85 S.Ct. 1220, 1221, 14 L.Ed.2d 95, 97 (1965). The evil attendant upon this practice is the foreclosure of markets to competitors through the use of purchasing power. *United States v. Airco, Inc.,* 386 F.Supp. 915, 917 (S.D.N.Y.1974). The first reciprocal dealing arrangement alleged by

Southern Concrete involved Williams Brothers' purchase of cement in exchange for United States Steel's loan guarantees; the second involved Williams Brothers' providing the steel company with storage facilities in exchange for the services of a cement technician. Southern Concrete dealt in none of the goods or services subject to the alleged reciprocal dealing agreements. Consequently, even assuming the existence of such agreements, the market for no Southern Concrete products was affected as a result thereof, and Southern Concrete could not have suffered injury thereby.

[7] Southern Concrete's claim of an exclusive dealing arrangement stands on no better footing. Under section 3 of the Clayton Act, 15 U.S.C. § 14, it is unlawful to require a purchaser not to deal with others as a condition of dealing with the seller. The obvious vice of such an arrangement is that it both restricts the purchaser from looking elsewhere for a more competitive source of supply and excludes the supplier's competitors from the purchaser's business. In this case Southern Concrete is neither the purchaser subject to this alleged arrangement nor a competitor of the supplier, United States Steel. "Standing to sue under § 3 of the Clayton Act has not been extended to those who are neither competitors of the alleged violating supplier nor themselves retricted purchasers." *Thomas v. Amerada Hess Corp.*, 393 F.Supp. 58, 76 (M.D.Pa.1975).

[8, 9] Lastly, throughout this proceeding Southern Concrete has failed to specify what injuries, if

any, it suffered as a result of the violations alleged. As the court below recognized, instead of setting forth "specific facts" in compliance with F.R.C.P. 56(e), Southern Concrete chose to rely upon

> . . . general allegations of injury due to the alleged conspiracy between U.S.S. and Williams Brothers to restrain trade in and to monopolize the ready-mix concrete market [making] no attempt to specify injuries to it due to the alleged tying, exclusive dealing or reciprocal dealing arrangements.

394 F.Supp. at 370. Rather than coming forward with credible evidence to support its allegation of injury —the *sine qua non* for stating a cause of action by a private antitrust plaintiff, *Shumate & Co. v. National Ass'n of Sec. Dealers, Inc.*, 509 F.2d 147, 152 (5th Cir. 1975)—Southern Concrete chose to rely on the statement by the Supreme Court in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458, 464 (1962), that summary disposition is not favored in antitrust cases. In *Poller* the Court was considering charges of conspiracy to restrain trade; such charges normally require proof of specific intent and necessitate trial. There is no such requirement of proof with regard to the alleged antitrust violations involved in this appeal. *Capital Temporaries, Inc. of Hartford v. Olsten Corp.*, 506 F.2d 658, 667 (2d Cir. 1974). Southern Concrete may not "bootstrap [its] hollow claim of an anticompetitive effect into a triable issue by relying on" *Poller*. *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286, 1292 (2d Cir. 1974), *cert. denied*,

419 U.S. 1022, 95 S.Ct. 498, 42 L.Ed.2d 296 (1974). Mere conclusory allegations of an antitrust violation will not suffice to defeat a motion for summary judgment. *Solomon v. Houston Corrugated Box Co., Inc.*, 526 F.2d 389 (5th Cir. 1976).[5]

AFFIRMED.

[5]We feel it appropriate to state that this is not the usual summary judgment case. When the partial summary judgment was granted there had been extensive discovery and the facts were well established, as will be seen by reference to the opinion of the district court.

Appendix B

United States District Court
N. D. Georgia,
Atlanta Division

Civ. A. No. 15378.

Southern Concrete Co.

vs.

United States Steel Corporation, et al.

March 31, 1975

Order

Richard C. Freeman, District Judge.

This private antitrust action was instituted by plaintiff Southern Concrete Company (hereinafter "Southern"), a now-defunct subsidiary of Southern Products Company. From the late 1950's until October, 1969, plaintiff was engaged in the production and sale of ready-mixed concrete in the Atlanta area. The action is brought against United States Steel Corporation (hereinafter "U.S.S.") which, through its Universal Atlas Cement Division (hereinafter "U.A.C."), is a major supplier of portland cement, one of the ingredients of ready-mixed concrete, and

against Williams Brothers Concrete, Inc. (hereinafter "Williams Brothers"), a producer of ready-mixed concrete in the Atlanta area.[1] The action has been submitted to the court on the motion of U.S.S. for partial summary judgment; on its motion to strike the affidavit of Walter B. Dobbins, which affidavit was submitted with the brief in opposition to the motion for partial summary judgment; and on U.S.S.'s second motion for partial summary judgment. In this order the court will rule on U.S.S.'s first motion for partial summary judgment and on its motion to strike. An order on the second motion for partial summary judgment will be issued forthwith.

I. MOTION FOR PARTIAL SUMMARY JUDGMENT

U.S.S. seeks summary judgment as to the following issues for the reasons indicated: (1) Southern lacks standing under the provisions of § 4 of the Clayton Act, 15 U.S.C. § 15, to assert the claim that U.S.S. has violated § 1 of the Sherman Act, 15 U.S.C. § 1, by engaging in an illegal tying arrangement where the granting of a loan guarantee (the alleged tying product) to Williams Brothers' was conditioned upon Williams Brothers' agreement to purchase cement (the alleged tied product) from U.A.C.; (2) Southern lacks standing under § 4 of the Clayton Act to assert the claim that U.S.S. and Williams Brothers have

[1]The complaint also named Gifford-Hill & Company, Inc. as a defendant. Pursuant to a consent stipulation filed on December 26, 1973, that party was given until thirty days after final judgment and final decision on any appeal therefrom as to U.S.S. and Williams Brothers to respond to the amended complaint.

violated § 1 of the Sherman Act by engaging in reciprocal dealings wherein U.S.S. agreed to supply a loan guarantee to Williams Brothers if the latter would agree to purchase cement from U.A.C.; (3) Southern lacks standing under § 4 of the Clayton Act to assert the claim that U.S.S. violated § 3 of the Clayton Act, 15 U.S.C. § 14, by selling cement to Williams Brothers on the condition that Williams Brothers not use or deal in the cement of any other cement producer; (4) Southern lacks standing under the provisions of § 4 of the Clayton Act to assert the claim that U.S.S. and Williams Brothers have violated § 1 of the Sherman Act by engaging in reciprocal dealings wherein Williams Brothers agreed to provide storage facilities to U.S.S. if U.S.S. would agree to provide the services of one Roy Millhouse to Williams Brothers; (5) Southern cannot assert the claims that U.S.S. has violated § 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in a "conspiracy to attempt to monopolize" the production and sale of both cement and ready-mixed concrete in any geographic market for the reason that such does not assert a violation of any law; (6) U.S.S. has not violated § 7 of the Clayton Act, 15 U.S.C. § 18, by acquiring the stock or assets of Williams Brothers since it is undisputed that U.S.S. has never acquired any stock or assets of Williams; (7) U.S.S. has made no discriminatory sales to Williams in violation of § 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), since Southern has at no relevant time purchased cement from U.S.S.; and, (8) U.S.S. cannot have violated § 2 of the Sherman Act by (a)

monopolizing and (b) attempting to monopolize the production and sale of ready-mixed concrete for the reason that it would be impossible as a matter of law for U.S.S. to be found to have attempted to monopolize or to have monopolized a product which it neither manufactures nor sells. In compliance with Local Court R. 91.1 and 91.72, U.S.S. has filed a brief in support of its motion and a separate short statement of the material facts as to which it contends there is no genuine issue to be tried. It has also attached to the motion two affidavits in support thereof.

In response plaintiff has filed a lengthy brief in opposition to the granting of any portion of the motion for partial summary judgment. This brief includes a counterstatement of facts necessary to determine the issues presented by the motion. The affidavit of Walter B. Dobbins was filed several days later "for use as evidence" in opposition to U.S.S.'s motion for partial summary judgment.

[1] Included in plaintiff's brief in opposition to the partial summary judgment motion is an extensive dissertation on the "judicial standards governing seriatim summary dispositions sought by the instant motion." It has cited extensive case law for the following propositions: (1) summary judgment is to be very carefully employed when a jury trial has been requested; (2) the court must construe all allegations in the light most favorable to the opposing party, (3) summary judgment should not be granted if there are conflicting inferences from the uncontested facts, (4) on a motion for summary judgment the

court can only decide if there are issues to be decided, and (5) the moving party must shoulder the burden to establish the absence of genuine material facts. The court agrees with these propositions[2] and is aware of the requirements of Rule 56, the heavy burden on the movant, and the importance of a jury trial. However, the court also agrees with the assertion of U.S.S. that summary judgment can be appropriate as to claims under the antitrust laws, and that the burden imposed on the moving party by Rule 56(e)[3] applies to parties seeking relief under the antitrust laws as well as any other civil action. First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 290, 88 S.Ct. 1575, 20 L.Ed. 2d 569 (1968). *See also* Searer v. West Michigan Telecasters, Inc., 381 F.Supp. 634 (W.D.Mich.1974).

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[2]With respect to the proposition that the court can only decide if there are issues to be decided, plaintiff's brief stresses that if the court determines on a motion for summary judgment that material issues of fact exist, it cannot decide the fact issues at that time, even if the adverse party is unlikely to prevail at trial as to that issue. We agree. As Rule 56(d), Fed.R.Civ.P. itself makes clear, however, if on a motion for summary judgment under Rule 56 judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court shall if practicable, ascertain what material facts exist without substantial dispute; upon the trial of the action the facts so specified are deemed established.

[3]Rule 56(e) provides, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment if appropriate shall be entered against him.

A. *Claims as to Illegal Tying Arrangements, Reciprocal Dealings, and Exclusive Dealings between Defendants U.S.S. and Williams Brothers*

U.S.S. contends that Southern cannot assert a claim for damages on account of tying arrangements reciprocal dealings or exclusive dealing arrangements between U.S.S. and Williams Brothers pursuant to § 4 of the Clayton Act because it is not within the limited class of persons who could raise such a claim. U.S.S. contends that the only persons who could raise such a claim are the competitors of U.S.S./U.A.C. and the customers of U.S.S./U.A.C. which are subject to the alleged restraint. It contends that there is no dispute that U.S.S., through U.A.C., is a producer and supplier of cement and has sold, and does sell, cement to Williams Brothers; that U.A.C. has never produced or sold ready-mixed concrete in competition with Southern; that Southern has never manufactured or sold cement in competition with U.A.C.; and that Southern has not purchased cement from U.A.C. within the period of limitations. *See* U.S.S.'s Statement of Material Facts, No. 1, 3, 4, 5, 10. U.S.S. further contends that plaintiff could not have been "injured in his business or property by reason of" these alleged violations within the meaning of § 4 of the Clayton Act. It sets forth the main test or standards used by the various Courts of Appeals to determine whether a particular action or claim may be asserted under § 4 and asserts that Southern cannot pursue these claims against U.S.S. under these tests.

Southern contends that whether or not the tying, exclusive dealing and reciprocal dealing arrangements of defendants "were a substantial factor in causing damages" claimed by plaintiff is a question of fact and, thus, not susceptible to summary disposition. It argues that § 4 of the Clayton Act is to be given a liberal construction and that it is within the "zone of protected interests"[4] contemplated by that section. It defines the interests which it seeks to protect as follows:

> its rights to purchase gray Portland cement and other ready-mixed concrete ingredients, along with the services incidental to the purchase of these goods; and thereby to produce and sell ready-mixed concrete in a market unaffected by unlawful restraints.

Plaintiff argues, that in Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20 (5th Cir. 1974) (hereinafter *"Terrell III"*), the Fifth Circuit Court of Appeals expanded the class of protected private plaintiffs by holding that a private right of action under § 4 of the Clayton Act should be recognized when the plaintiff makes a mere showing that defendant's alleged violation of the antitrust laws had "materially contributed" to plaintiff's injuries. Plaintiff further contends that it is within the sector of the economy threatened by defendant's practices, which area he seeks to define as the production and sale of ready-mixed concrete in the Atlanta Metropolitan market area.

[4] See Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

[2-4] Section 4 of the Clayton Act authorizes a private plaintiff to sue for injuries sustained as a consequence of an antitrust violation. Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 48 (5th Cir. 1974). This section provides:

> Any person who shall be injured in his *business or property by reason of* anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Emphasis added.)

By the terms of § 4, therefore, two criteria must be satisfied before standing is established: the plaintiff must show that he has suffered injury to "business or property" and he must show that his injuries were incurred "by reason of" the defendant's illegal activities. Battle v. Liberty Nat'l Life Ins. Co., *supra;* In re Multidistrict Vehicle Air Pollution M.D.L. 31, 481 F.2d 122, 126 (9th Cir. 1973). *And see* Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487 (5th Cir. 1967). While § 4 is to be accorded a liberal construction, see Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948), it does not accord a right of action to every person who may have felt some "ripple effect" of the violation. Billy Baxter v. Coca Cola Co., 431 F.2d 183, 187 (2d Cir. 1970). The Supreme Court has acknowledged that the lower federal courts have been virtually unanimous in concluding

that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 n. 14, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). In In re Multidistrict Vehicle Air Pollution M.D.L. 31, *supra,* the various limitations employed by the Courts of Appeals are set forth. We need not apply each of those tests to the claims addressed by this portion of the summary judgment motion; in this circuit a plaintiff who asserts that he has suffered injuries "by reason of" the defendants' illegal activities must show that he is "within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby." Battle v. Liberty Nat'l Life Ins. Co., *supra* at 49; Dailey v. Quality School Plan, Ins. *supra* at 487 *quoting* South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966).

[5] Clearly, to determine the sector of the economy in which an antitrust violation threatened a breakdown of competitive conditions and to determine who can be considered to be proximately injured by an antitrust violation, the court must look to the nature of the antitrust violation itself. A tying arrangement may be defined as an agreement by a party to sell one's product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Northern Pac. Ry. Co. v. United States, 356

U.S. 1, 5-6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). The seller uses his leverage in the market for the tying product in order to gain an advantage in the tied market. *Id.* Thus, the buyer is "coerced" into agreeing to take a product he does not want in order to obtain an article he desires, United States v. Loew's, Inc., 371 U.S. 38, 45, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962); and the result is that competing sellers in the tied market are "foreclosed" by the tie-in and competition "on the merits" in the tied product is prevented. *Id.;* Times Picayune Publishing Co. v. United States, 345 U.S. 594, 605, 73 S.Ct. 872, 97 L.Ed. 1277 (1953).[5] Thus, the Supreme Court cases make clear that the area of the economy in which a tying arrangement threatens a breakdown of competitive conditions is the market for the tied product and that those who would be proximately injured by such an arrangement would be the purchasers[6] of the tied product and the sellers of the tied product in competition with the seller who imposes the tie-in. Similarly, where in an exclusive dealing arrangement a party binds himself to purchase a product only from a certain seller, he is foreclosed from obtaining the product at a lower price or of higher quality from other sellers. Thus, competition as to the product is threatened and the purchaser and other sellers of the

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[5]In Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969), the Supreme Court held that an extension of credit by a subsidiary of a manufacturing company conditioned on the borrower's promise to purchase the product of the parent company could amount to an illegal tie-in.

[6]*See* note 13, *infra.*

product are injured. A similar analysis applied to a reciprocal dealing arrangement leads to a conclusion that purchasers of the products which are the subject of the arrangement and the competitors for the sale of such products are the injured parties and competition as to such products is foreclosed.

[6] In the instant case, the tying arrangement[7] was the extension of direct and indirect loans (the tying product) by U.S.S. to Williams Brothers conditioned on the purchase from U.S.S. of cement (the tied product) by Williams Brothers.[8] Similarly, the challenged reciprocal dealing arrangement[9] involves U.S.S.'s guaranteeing of a loan and/or U.S.S.'s providing the services of Mr. Millhouse to Williams Brothers in return for purchase of cement by Williams Brothers from U.S.S. The exclusive dealing violation[10] arises from the sale of cement on the condi-

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[7]For purposes of this motion U.S.S. assumes arguendo that the arrangement as to credit and cement purchases from U.S.S. by Williams Brothers could be termed a tying, exclusive dealing, or reciprocal dealing arrangement and that it is a violation of the antitrust laws. The court's reference to a tying, exclusive dealing or reciprocal dealing arrangement between these defendants is not, of course, a finding or conclusion that the arrangements between these defendants were such or violated the antitrust laws.

[8]See Counterstatement of Material Facts in plaintiff's brief in opposition at page 9: ". . . UAC was in full agreement with U.S.S.'s proposed 'tying arrangement' to secure a captive Atlanta market *for sale of UAC's cement product.* . . ." (Emphasis added.) It is important to note that in all the briefs submitted in connection with the motion, the parties assume that cement and ready-mix concrete are not one and the same, i.e. that they are not interchangeable, and that sellers of cement are not in competition with sellers of ready-mixed concrete. Thus, the relevant market for cement sales differs from the relevant market for ready-mixed concrete sales.

[9]*See* note 7, *supra.*

[10]*See* note 7, *supra.*

tion or understanding that the purchaser of cement would not use or deal in the cement of any other cement producer. In each of these arrangements the tied product or the product which is the subject of the agreement is cement. Thus, the area of the economy threatened with a breakdown of competitive conditions is cement sales and those who could claim to be proximately injured by such arrangements by U.S.S. are purchasers[11] of cement from U.S.S. pursuant to such an arrangement or competitors of U.S.S. in cement sales. Since plaintiff nowhere denies the assertions in U.S.S.'s Statement or Material Facts[12] that it did not purchase cement from U.S.S. during the relevant statute of limitations period,[13] and that it was never a seller of cement, as distinguished from ready-mixed concrete, in competition with U.S.S./U.A.C., the court finds that it does not compete in the area of the economy which would be threatened with a breakdown of competitive conditions by the challenged arrangements, cement sales, and further, finds that it would not be proximately injured by such arrangements. Thus, applying the test utilized in the Fifth Circuit to determine whether a party can allege to be injured "by reason of" an antitrust violation, and thus has standing to claim damages pursuant to § 4 of the Clayton Act for such antitrust violation, we find that Southern does not have standing to seek damages on account of the alleged tying, reciprocal dealing or exclusive dealing arrangements between U.S.S./U.A.C. and Williams Brothers with respect to U.S.S./U.A.C.'s sale of cement to Williams Brothers.

[11]*See* note 13, *infra.*

[12]Pursuant to Local Court R. 91.72 "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." We do not rely solely on the failure of Southern to controvert these assertions, however, as its brief makes clear that it does not contend that it purchased, directly or indirectly, cement from U.S.S./U.A.C. during the statute of limitations period, or that it was a manufacturer or seller of cement at any time.

[13]Since Southern does not allege that it was either a direct or indirect purchase of cement from U.S.S./U.A.C., the issue of whether an indirect purchaser, that is, a purchaser of the product at a subsequent level in the chain of distribution may recover for the alleged violations asserted herein is not presented. As a result, we need not and do not decide herein whether such indirect purchasers could claim to be proximately injured "by reason of" antitrust violations such as the one here in question.

[7] We reject the contention made by plaintiff that the question of causation is necessarily a question of fact which cannot be decided on a motion for summary judgment and must be submitted to the jury. Plaintiff's assertions of injury in its brief are general allegations of injury due to an alleged conspiracy between U.S.S. and Williams Brothers to restrain trade in and to monopolize the ready-mixed concrete market; it makes no attempt to specify injuries to it due to the alleged tying, exclusive dealing or reciprocal dealing arrangements. Further, as noted above, plaintiff has made no attempt to show that it was a seller of cement or a purchaser of cement from U.S.S./U.A.C. This fails to satisfy the burden imposed on a party opposing summary judgment. Rule 56(e), Fed.R.Civ.P. As stated in First Nat'l Bank v. Cities Service Co., *supra:*

> To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule

> 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations of their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Id. 391 U.S. at 289-90, 88 S.Ct. at 1593.

[8] The court also rejects plaintiff's contention that in *Terrell III, supra,* the Fifth Circuit Court of Appeals expanded the class of protected private plaintiffs by holding that a private right of action under § 4 of the Clayton Act should be recognized when the plaintiff makes a mere showing that defendants' alleged violation of the antitrust laws had "materially contributed" to plaintiff's injuries. The *Terrell III* opinion involved an appeal by the defendant from a trial on damages. Earlier in the action the district court judge, after a jury verdict in plaintiff's favor, had entered judgment on the verdict against this defendant and judgment notwithstanding the verdict in favor of the individual defendants. On defendant's (first) appeal a majority of the original panel in the Court of Appeals vacated the judgment against the defendant and remanded the case for a new trial. Household Goods Carriers' Bureau v. Terrell, 417

F.2d 47 (5th Cir. 1969). Upon rehearing en banc, a majority of the Court affirmed the district court's judgment against the defendant, but reversed for a new trial on the issue of damages. Household Goods Carriers' Bureau v. Terrell, 452 F.2d 152 (5th Cir. 1971) (en banc). In *Terrell III* the panel reviewed this subsequent trial on damages. That it did not intend to set forth a new test on standing nor deal with causation in fact is made perfectly clear in the *Terrell III* opinion; the Court emphasized that "the *en banc* decision establishing liability finally adjudicated the issue of causation" and that "the decision of this court sitting *en banc* at an earlier stage of this same case represents the law of the case." 494 F.2d at 19. The *Terrell III* Court was thus concerned with the measure of proof as to amount of damages rather than causation. As stated in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931) (and quoted in *Terrell III):*

> [T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes recovery of uncertain damages applies to such as are not the *certain* result of the wrong, not to those damages which are *definitely* attributable to the wrong and only uncertain in respect of their amount. (Emphasis added.)

See also Shumate & Co. v. National Ass'n of Securities Dealers, Inc., 509 F.2d 147, 153 (5th Cir. 1975)

("although [the Court is] generally lenient as to evidence required to show the amount of damages in antitrust matters once liability is determined, courts do not permit the fact of damage necessary to prove liability to be based on speculation."); Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 901-02 (5th Cir. 1973), cert. denied, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150.

The court's conclusion is that plaintiff does not have standing to claim damages on account of the tying, exclusive dealing or reciprocal dealing arrangements between U.S.S./U.A.C.; it is not a ruling on admissibility of evidence with respect to claims which are not foreclosed by this order, for example, the alleged conspiracy to restrain trade in or to monopolize the ready-mixed concrete and cement markets. *Cf.* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). Rulings on admissibility of evidence as distinguished from sufficiencies of claims, is best reserved for trial.

We hold that plaintiff lacks standing under § 4 of the Clayton Act to recover damages "by reason of" the alleged tying, exclusive dealing or reciprocal dealing arrangements between defendants U.S.S. and William Brothers. To that extent, this portion of the motion for partial summary judgment is granted.

B. *Alleged Conspiracy to Attempt to Monopolize*

[9] U.S.S. further seeks partial summary judgment on the ground that Southern cannot assert the claims that U.S.S. has violated § 2 of the Sherman

Act, by engaging in a "conspiracy to attempt to monopolize" the production and sale of both cement and ready-mixed concrete for the reason that such does not assert a violation of any law. Plaintiff opposes this portion of the summary judgment motion contending that its charged violation, "conspiracy to attempt to monopolize," is within the Congressional intention of § 2 of the Sherman Act and that the violation is distinguishable from the charge of attempt to monopolize in that it does not require the showing of specific intent, but, rather is established upon commission of predatory acts pursuant to the alleged conspiracy to monopolize.

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine and conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.

The court agrees with defendant U.S.S. that three distinct offenses are to be found in this provision: (1) monopolization, (2) attempt to monopolize, and (3) combination or conspiracy to monopolize. Plaintiff's contention that in United States v. Dunham Concrete Prod., Inc., 501 F.2d 80 (5th Cir. 1974), the Fifth Circuit Court of Appeals recognized the crime of a

conspiracy to attempt to monopolize "by failing to hold that its inclusion in the lower Court's charges to a jury was reversible error" is totally without merit. *Dunham* involved an appeal from an order granting a new trial pursuant to 28 U.S.C. § 2255. The court held that the submission to the jury of a form for recording their verdict[14] which listed as separate counts "Conspiracy to attempt to monopolize in violation of Section 2 of the Sherman Act" and "Conspiracy to attempt to extort", which form had been prepared by counsel for defendant, did not warrant relief from judgment pursuant to § 2255. Accordingly, it reversed the trial court as to this portion of its order. The Court's reversal was not based on a finding that there is a separate crime of "conspiracy to attempt to monopolize" in § 2 of the Sherman Act. It was based on the finding that the *"error* in wording of this form for recording the verdict did not contribute to [the] conviction." *Id.* at 84 (emphasis added).[15] It further mentioned that when Government counsel objected to the form, "[u]naccountably" the court adopted it as presented and sent it out with the jury. There is nothing in the opinion to suggest

[14]It is clear from the opinion that the phrase "conspiracy to attempt to . . ." appeared twice on the form for recording the jury verdict; the charges to the jury were not the subject of the appeal.

[15]The Court stated that "conspiracy to attempt to monopolize" could have only four conceivable meanings: (A) conspiracy to monopolize, (B) conspiracy to fail to monopolize, (C) attempt to monopolize and (D) attempt to fail to monopolize. Since meanings B and D are *"nonsense"* and since the jury had been unable to agree as to the count which charged a conspiracy to monopolize (meaning A), the Court construed the verdict as finding an attempt to monopolize. *Id.* at 84.

that a separate offense exists for "conspiracy to attempt to monopolize"; the entire opinion indicates that no such crime exists.

Accordingly, insofar as U.S.S. seeks partial summary judgment on the claim that it conspired to attempt to monopolize the production and sale of cement or ready-mixed concrete in any geographic market, the motion is granted.

C. *Alleged Acquisition of Stock or Assets*

U.S.S. seeks summary judgment in its favor as to Southern's claim for damages for an alleged violation of § 7 of the Clayton Act, 15 U.S.C. § 18. The acquisition complained of is alleged to be the "acquisition" of Williams Brothers by U.S.S. The latter seeks summary judgment on this issue based on the allegations that it has never purchased, possessed, or otherwise acquired a single share of stock in Williams and that it has never purchased, possessed or otherwise acquired any asset of Williams. *See* U.S.S.'s Statement of Material Facts, No. 15 and 16. It argues that plaintiff's contention that the right of first refusal as to Williams Brothers' stock granted to U.S.S. and exercisable in the event of default on a loan made by Trust Company of Georgia to Williams Brothers and guaranteed by U.S.S., amounts to an "acquisition" of stock and assets is insufficient as a matter of law. U.S.S. further contends that even if viewed as an "acquisition" within the meaning of § 7 of the Clayton Act, plaintiff was not, and could not, have been damaged by such arrangement.

Plaintiff opposes this portion of the motion with the following contentions:

1. The circumstances surrounding the vertical financing and business arrangement existing between U.S.S. and Williams Brothers were tantamount to vertical integration (a supplier's acquisition of its customer) and as such indicate a probability that U.S.S. used and will continue to use its dominant guarantor's position as leverage to put pressure upon the debtor to substantially lessen competition in the Portland cement and ready-mixed concrete industries in the relevant geographic markets.
2. This vertical arrangement afforded Williams Brothers decisive cost advantages in these markets over its nonintegrated competition, such as Southern in the purchase of the costliest concrete ingredient, Portland cement, which advantages when passed on in the form of lower concrete prices to consumers resulted in prices lower than Southern's costs, ultimately forced Southern out of business in October, 1969.

It contends that U.S.S.'s "undue influence" over Williams Brothers of the "collateral security option to purchase Williams Brothers' outstanding stock" is an "acquisition" within the meaning of § 7. It argues that this arrangement is ipso facto violative of § 7, but if the court is "not disposed" to enter such a determination, it is "critical" that the term "acquisition", as used in § 7, "encompasses such coercive loan arrangements and its anticompetitiveness is reserved

for jury deliberation." Plaintiff stresses that "summary judgment is manifestly inappropirate on the issues of intent and state of mind necessarily raised by inquiry into the circumstances surrounding the creation and operation of this vertical combination." Both parties to this motion rely on Metro-Goldwyn-Mayer v. Transamerica Corp., 303 F.Supp. 1344 (S.D. N.Y.1969) (hereinafter "MGM") in support of their contentions.

[10] Section 7 of the Clayton Act, 15 U.S.C. § 18, provides, in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . .

There can be a claim for money damages, pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, for a violation of § 7 of the Clayton Act. Dailey v. Quality School Plan, Inc., *supra;* Gottesman v. General Motors Corp., 414 F.2d 956, 961 (2d Cir. 1969). *See* Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 381, 85 S.Ct. 1473, 14 L.Ed. 2d 405 (1965).

[11, 12] A claim for damages for violation of § 7 presents the questions of whether there has been an acquisition of stock or assets within the meaning

of § 7; if so, whether plaintiff can claim damages on account of such acquisition; what is the appropriate section of the country; and whether there is a reasonable probability of a substantial lessening of competition. Where there is no "acquisition" of stock or assets, therefore, the other questions need not be answered and a claim for damages will not lie. *See infra,* at note 7 and accompanying text. The words "acquire" and "assets" are not terms of art or technical legal language; they are generic, imprecise terms encompassing a broad spectrum of transactions whereby the acquiring party may accomplish the acquisition by means of purchase, assignment, lease, license, or other otherwise. United States v. Columbia Pictures Corp., 189 F.Supp. 153, 181-82 (S.D. N.Y. 1960).

In the instant case it is not in dispute that in 1965 and 1966 the Trust Company of Georgia (TCG) granted three loans to Williams Brothers. U.S.S. agreed with TCG that it would guarantee repayment of the loan in the event of default by Williams Brothers. These guarantees were secured by the right of first refusal to purchase stock of Williams Brothers, a right which was to remain effect only while there were outstanding balances on the loans.[16] Two of the loans have been repaid in full by Williams Brothers; and thus, the right of first refusal in the event of default on these loans no longer exists. The

[16]U.S.S. explains in its brief in support of its motion for partial summary judgment that the option to purchase stock would come into play only if Williams Brothers notified U.S.S. that a third party had offered to buy the Williams Brothers' stock.

guarantee with respect to the third loan has been withdrawn by U.S.S. *See* U.S.S.'s Statement of Material Facts, No. 11, 12, 13 and 14.

[13] It is clear that the right of first refusal in the event of default was never exercised and will never be exercised because such right is now nonexistent. Thus, U.S.S. never possessed, in any meaningful sense of the word, the stock of Williams Brothers. The court finds that characterizing the right of first refusal for the purchase of stock granted to a guarantor of a loan furnished by a third party as an "acquisition" within the purview of § 7 of the Clayton Act stretches the language of this section to absurd lengths and, further, that such characterization could have serious deleterious effects on the commercial transactions of corporations and lending institutions.

As both parties rely to some extent on *MGM, supra,* a short discussion of that opinion and a comparison to the situation here involved is appropriate. In the *MGM* case plaintiff M.G.M. sought to enjoin the defendants from proceeding with a cash tender offer by Tracy Investment Company for M.G.M. stock. 303 F.Supp. at 1346. The cash tender offer was being financed by Transamerica Financial Corporation, whose parent corporation Transamerica Corporation, owned 99.6% of United Artists Corporation, a major competitor of M.G.M. The court found that the acquisition by the Transamerica-United Artists group of working control of M.G.M. stock "*would* violate" § 7 of the Clayton Act, 303 F.Supp. at 1348 (em-

phasis added), and thus, that the existing Financial-Tracy loan arrangement *"pose[d] a threat* of violation of § 7." 303 F.Supp. at 1349 (emphasis added). The court granted M.G.M. preliminary injunctive relief restraining defendants from further proceeding with the tender offer until the Financial-Tracy loan agreement was terminated or amended to provide that any M.G.M. shares acquired by Tracy would not be delivered or pledged with Financial, its parent Transamerica, or any of their affiliates. 303 F. Supp. at 1354.

The MGM case is distinguishable from the action *sub judice* in several respects. In ***MGM,*** the court was faced with a creditor-debtor relationship with the loan secured by the shares to be acquired in the tender offer. Herein, the challenged relationship is that of guarantor and principal debtor with the guarantee secured by the right of first refusal as to the purchase of stock. Secondly, the creditor in ***MGM*** controlled a major competitor of the corporation whose stock was the subject of the tender offer. Here it is not alleged that U.S.S., the guarantor, was itself or through its subsidiaries, in the ready-mixed concrete business. Finally, and most important, ***MGM*** is a decision on a motion for a preliminary injunction. Here damages are being sought.

Section 16 of the Clayton Act, 15 U.S.C. § 26, permits a private party to seek injunctive relief against *"threatened* loss or damage by a violation of the antitrust laws." (Emphasis added).[17] In Credit Bureau Reports, Inc. v. Retail Credit Corp., 476 F.2d

[17]*Cf.* § 4 of the Clayton Act, 15 U.S.C. § 15, quoted on page 5, *supra.*

989 (5th Cir. 1973) the Fifth Circuit Court of Appeals explained:

> Section 16 of the Clayton Act entitles private litigants to injunctive relief from threatened injury resulting from a violation of the antitrust laws. To obtain such relief the complaining party must prove that the alleged offender either already has violated the antitrust laws or *that such violation is impending* and that, because of this violation, he is threatened with loss or injury. Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 130, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Id. at 992 (emphasis added). The ***MGM*** court specifically found that the "threat" of a § 7 violation warranted injunctive relief. Its finding that acquisition of the M.G.M. stock "would violate" § 7 indicates that there would be no violation thereof until default and the resulting acquisition. The distinction between a private party seeking injunctive relief and one claiming damages is crucial.

Further, the Second Circuit Court of Appeals, in F. T. C. v. PepsiCo., Inc., 477 F.2d 24 (2d Cir. 1973), stated that it is "elementary" that intentions of the acquiring corporation are *not* to be considered in determining whether a § 7 violation occurred, but that it was helpful to examine them in light of the extraordinary relief [a preliminary injunction] which was sought. *Id.* at 30. Thus, plaintiff's contention that the intent of U.S.S. must be considered and that intent is a matter for the jury does not preclude summary relief. Again, the distinction between a claim for damages and a request for injunctive relief is crucial.

The court wonders whether counsel for plaintiff was attempting to actively mislead the court in its discussion of the *MGM* decision; the brief in opposition to the partial summary judgment motion reads as follows:

> Finally, that the court premised its holding —that the subject loan arrangements posed such a threat to competition as envisioned by the language of Section 7—on its implicit finding that the subject loan arrangements were tantamount of [sic.] an acquisition. *In arriving at that determination, the court opined that whether a particular creditor debtor relationship is violative of*
>
> *Section 7*
>
> "depends upon whether such probability is revealed from the surrounding circumstances, including the expressed purpose of the relationship, the debtor's solvency or insolvency, the terms, and the size of the loan, the percentage which it bears to the debtor's entire debt and capital structure, the existence or non-existence of other contracts of [sic.] relationships between the parties, etc.
>
> It would be naive, of course, to believe that a powerful creditor, which has placed a debtor in a position as leverage to put pressure upon the debtor to conduct its business including its control over others, in a way that would accord with the creditor's interest. *If the evidence revealed such an intent, or if the likelihood of such conduct could be reasonably inferred from the surrounding circumstances,*
>
> *ibid, private recovery would be appropriate.*

Plaintiff's brief at p. 59 (emphasis in *MGM* quotation supplied by plaintiff; emphasis in rest of quotation supplied by the court). Reference to the published opinion shows that the MGM court was *not* discussing "whether a particular creditor debtor relationship is violative of Section 7" and did *not* opine that "private recovery would be appropriate." The quotation, seemingly deliberately pulled out of context, begins with: "In our view, therefore, the question of whether a debtor creditor relationship *must be enjoined* as threatening competition in violation of § 7 depends upon . . ."; the last sentence of this quotation reads (in its entirety): "If the evidence revealed such an intent, or if the likelihood of such conduct could reasonably be inferred from the surrounding circumstances, *a case for injunctive relief might exist.*" 303 F.Supp. at 1351 (emphasis added). If counsel for plaintiff assumed that this court would rely on a quoted portion of another decision without referring to the test of the opinion in the officially reported form, they were seriously mistaken.

In light of this court's conclusion that the guaranteeing of a loan in return for a right of first refusal for the purchase of the debtor's stock is not an acquisition of stock or assets and, thus, does not give rise to a claim for damages[18] due to a violation of § 7, this portion of U.S.S.'s motion for partial summary judgment is granted.

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[18]The court does not express any opinion on the question of whether Southern could have obtained injunctive relief, pursuant to § 16 of the Clayton Act, while the loans were outstanding.

D. *Alleged Price Discrimination in Cement Sales*

The next portion of U.S.S.'s motion for partial summary judgment seeks summary judgment on Southern's claims under § 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 2(a), for the reason that Southern has made no purchases of cement from U.S.S./U.A.C. Movant relies on Klein v. Lionel Corp., 237 F.2d 13 (3d Cir. 1956) and National Auto Brokers Corp. v. General Motors Corp., 376 F.Supp. 620 (S.D.N.Y. 1974), as support for its contention. It states in its reply brief that for purposes of its motion it is assumed arguendo that U.S.S. sold cement to certain purchasers in the Atlanta metropolitan area at discriminatory prices. It further states in this brief that the parties are not in dispute as to the issue presented to the court: "Whether plaintiff's status as a non-purchaser of cement from U.S.S. deprives plaintiff of a right of action against U.S.S. for discriminatory sales of cement by U.S.S."

In opposition to this portion of the partial summary judgment motion plaintiff relies solely on Perkins v. Standard Oil Co., 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969). After an extensive discussion of the *Perkins* decision plaintiff concludes:

> The only possible interpretation of this holding is that despite the number of distributive levels through which the price increment passed, the injury to Perkins, as to Southern, was direct and proximate.
>
> Under either of these analyses, *the indirect purchase claims of Southern* must stand. If the *Perkins* case holds that no privity is required, then the entire premise of U.S.S. in this section must fail.

Plaintiff's brief in opposition at 69 (emphasis added).

The court agrees with movant that plaintiff's reliance on the *Perkins* decision is misplaced. *Perkins* was an action brought by a direct purchaser of gasoline and oil from Standard Oil Company, the defendant, for price discrimination in sales of gasoline by Standard. The question before the Court was *not* whether plaintiff Perkins had standing; the decision makes clear that Perkins purchased gasoline and oil from Standard at a higher price than that charged by defendant to its own Branded Dealers and to Signal Oil Company. 395 U.S. at 644, 645, 89 S.Ct. 1871. Rather, the question before the Court was whether plaintiff could recover for damages suffered by plaintiff as a result of the price advantage granted by defendants to Signal, passed on by Signal to its subsidiary, and then passed on by the subsidiary to its subsidiary. The Court held that if the injured party was able to show a causal connection between the price discrimination in violation of the Act and the injury suffered, he could recover damages "regardless of the 'level' in the chain of distribution on which the injury occur[red]." 395 U.S. at 648, 89 S. Ct. at 1874. It noted that there was substantial evidence from which the jury could infer causation [of injury due to the price discrimination]. *Id.* Review of the decision indicates that the Court was not presented with an issue of standing to sue but rather

with the extent of damages recoverable. With reference to the question of whether the plaintiff could recover for financial losses he suffered as an individual because his two failing corporations were unable to pay him agreed brokerage fees for securing gasoline, rental on leases of service stations and other indebtedness, the Court stated:

> It is clear, in this case, however, that Perkins was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard. *Since he was* directly injured and was *clearly entitled to bring this suit,* he was entitled to present evidence of all of his losses to the jury.

Id. at 649-50, 89 S.Ct. at 1875 (emphasis added).

The Court does not take issue with plaintiff's discussion of the *Perkins* decision; but we do not accept its conclusions as to the *Perkins* holding or its applicability to this case. Further, we do not understand its reference to "the indirect purchase claims of Southern." Plaintiff does not dispute defendant's Statement of Material Fact that it never purchased cement from U.S.S. during the statute of limitations period. It offers no allegation or evidence to indicate that it purchased cement from U.S.S. "indirectly." We agree with U.S.S. that "there is a dispositive difference between being an indirect purchaser and having never purchased at all." U.S.S. reply brief at 14.

Our conclusion that plaintiff's reliance on *Perkins* is misplaced does not, however, automatically lead to the conclusion that summary judgment on this issue is appropriate. Having concluded that the holding in

Perkins is not concerned with standing, we must look to other case law to determine whether plaintiff's status as a "non-purchaser" deprives it of the right of action for damages on account of alleged price discrimination in cement sales by U.S.S.

[14] The cases cited by defendant seem to support it conclusion that a plaintiff seeking to recover damages for price discrimination must be a purchaser from the price discriminator. *See* Klein v. Lionel Corp., *supra* at 14-15; National Auto Brokers Corp. v. General Motors Corp., *supra* at 626. However, a recent decision by the Fifth Circuit Court of Appeals, sitting en banc, indicates that a plaintiff's status as a "non-purchaser" does not automatically deprive him of a right of action for damages. In Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir. 1973) (en banc), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743, the Court was presented with an appeal in an action brought by an operator of an independent gasoline station against several major gasoline suppliers. Plaintiff therein alleged that defendants through two stations within a mile of his station began selling gasoline to the public below his selling price although selling to others in the Dallas area at normal prices. Plaintiff alleged that defendants' purpose was to drive him out of business. The court concluded that plaintiff had alleged a classic case of violation of § 2(a) by discrimination in sales at wholesale by sellers to their purchaser who competed with plaintiff and with resulting injury to his business within the contemplation of § 4 of the Clayton Act. In a footnote the court added:

> We put aside the alternative theory of the district court that the plaintiff was not possessed of standing under § 2(a) to sue. The reasoning was that the purpose of § 2(a) was to prevent injury to purchasers from the discriminatory pricing practices of the same seller. This is only one purpose of the Act. It is settled that the Act also grants protection to a competitor whose business is injured by the discriminatory pricing policies.

Id. at 1143 n. 3 [citations omitted]. In *Littlejohn* plaintiff was the competitor of the persons who had received the benefit of the discriminatory pricing policies from defendants.[19]

As this portion of U.S.S.'s motion seeks summary judgment solely on the ground that plaintiff was not a purchaser from U.S.S., and as the *Littlejohn* decision indicates that such a finding is not dispositive as to standing to sue, this portion of the summary judgment motion is denied. This denial does not, however, mean that the issue must be submitted to the jury. Before plaintiff's claim can be submitted to the jury, it must, inter alia,[20] present evidence not only of price discrimination in cement sales by defendant U.S.S., but also it must present evidence sufficient to support an inference that it was injured *by reason of* the price *discrimination*. While plaintiff has not submitted evidence of any injury on account of the discrimination in prices rather than injury due to low prices generally, the issue of sufficiency of the evidence was not presented by this portion of U.S.S.'s motion. Thus, the question of whether plaintiff was so injured must be left for trial.

[19]Reference to the panel decision vacated by the Court en banc shows that a separate corporation (Sooner Oil Company) was one of the defendants' local wholesale dealers. 456 F.2d 225, 226 (5th Cir. 1972). Thus, the reference to protection of competitors seems to include competitors of purchasers from the price discriminator as well as competitors at the same level.

[20]*See, e.g.,* Bacon v. Texaco, Inc., 503 F.2d 946, 948 (5th Cir. 1974).

E. *Alleged Monopolization and Attempted Monopolization of Ready-Mixed Concrete Markets*

In the last portion of its partial summary judgment motion U.S.S. seeks summary judgment as to allegations of violation of § 2 of the Sherman Act by monopolization and attempted monopolization[21] of ready-mixed concrete in any relevant market for the reason that U.S.S. has never competed or been involved in such markets. In its brief it recognizes that both monopolization and attempted monopolization can be effected by concerted activity. It argues, however, that where concerted monopolization or attempts to monopolize have come before the courts, the concerted action has involved horizontal combinations, with each of the multiple defendants having itself manufactured or sold within the relevant product market.

Plaintiff's opposition to this portion of the motion is somewhat confusing. It speaks of U.S.S.'s *"inaccurate* supposition that Southern has charged UAC unilaterally with attempting to monopolize or with monopolizing the production and sale of ready-mixed concrete product in three relevant geographic markets" (emphasis added); then, it continues with the

[21]*See also* Part I, B, *supra.*

statement that "[t]o the contrary, Southern has explicitly alleged only that U.S.S. (UAC) in conjunction with Williams Brothers, have *jointly* and *severally* engaged in [a contract, combination and conspiracy to monopolize and to attempt to monopolize[22] and an attempt to monopolization.]" Most of the rest of plaintiff's brief on this issue is concerned with combination or conspiracy to monopolize, which claim, as U.S.S. emphasizes in its reply brief, is not before the court on this summary judgment motion.

[15] Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

A private party is entitled to sue for damages on account of violation of this section if he meets the requirements set out in § 4 of the Clayton Act, 15 U.S.C. § 15.[23] It is clear from the statute that three distinct offenses are proscribed: (a) monopolization, (b) attempted monopolization and (c) combination or conspiracy to monopolize. Defendant U.S.S. is clearly not seeking summary judgment with respect to allegations with respect to the third mentioned offense: combination or conspiracy to monopolize. If, as the brief in opposition perhaps suggests, plaintiff is alleging and will attempt to prove only that U.S.S. combined (or conspired) with Williams Brothers to monopolize the ready-mixed concrete markets, then, of course, issues as to monopolization or attempted monopolization of such markets by U.S.S. would not be submitted to the jury:

[22]*See* Part I, B, *supra*.
[23]*See* Part I, A, *supra*.

[16, 17] The fact that this portion of the partial summary judgment motion is opposed, however, suggests that plaintiff is still attempting to hold U.S.S. liable to it for monopolization and attempted monopolization of the ready-mixed concrete markets. To be guilty of monopolizing a "line of commerce" or relevant market, there must be the power of controlling prices or unreasonably restricting competition in the product. See United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956); Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F.Supp. 780 (S.D.Tex. 1971), aff'd, 476 F.2d 989 (5th Cir. 1973). The essence of the charge of attempted monopolization is not that monopolization is a *fait accompli,* but that defendant or defendants have manifested a specific intent to do what the law forbids.

The court finds that this portion of U.S.S.'s motion must be denied for two reasons. First, while its brief in support of its motion states that U.A.C. has never made or marketed ready-mixed concrete anywhere within the defined territories, such factual allegation does not appear in its Statement of Material Facts

and, even in the brief, is not supported by reference to evidentiary material in the record. Since the allegation does not appear in its Statement of Material Facts, it cannot be deemed admitted even though Southern's brief in opposition does not specifically set the matter in dispute. *See* Local Court R. 91.72.

[18] Second, it has been recognized that where by monopolizing one field, a party secured dominant market power in a second field, such party has monopolized the second field in violation of § 2 of the Sherman Act. *See* Credit Bureau Reports, Inc. v. Retail Credit Co., supra at 793; Coleman Motor Co. v. Chrysler Corp., 376 F.Supp. 546 (W.D.Pa. 1974); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D.Mass. 1953).

[19] While it may be difficult for plaintiff to prove that U.S.S./U.A.C. monopolized or attempted to monopolize the ready-mixed concrete market if, in fact, U.S.S./U.A.C. never manufactured or sold ready-mixed concrete, the motion is not based on lack of proof. As movant's allegation as to nonparticipation in this market is not referenced to evidentiary material in the record nor found in its Statement of Material Facts, and as this portion of the motion is not based on an alleged lack of proof, the court declines to foreclose plaintiff from the opportunity to submit proof on these issues; thus, whether plaintiff has sufficient evidence as to these violations to warrant submission thereof to the jury must await trial.

Accordingly, the court finds that movant has not satisfied its burden under Rule 56(c), Fed.R.Civ.P.,

as to this issue and that summary judgment thereon must be, and hereby is, denied.

II. MOTION TO STRIKE AFFIDAVIT

Defendant U.S.S. has moved to strike the affidavit of Walter B. Dobbins, which was submitted in support of the brief in opposition to partial summary judgment, on the ground that it does not conform to the requirements of Rule 56(e), Fed.R.Civ.P.[24] Specifically, U.S.S. contends that the affidavit does not show affirmatively that the affiant is competent to testify to the matters stated therein and contains unsupported "facts" "obviously" not within the personal knowledge of the affiant and which would not be admissible in evidence. U.S.S. lists a number of statements made in the affidavit which, according to U.S.S., could not be within the personal knowledge of the affiant, or would normally call for expert testimony.

Plaintiff has filed a brief in opposition to the motion to strike. While plaintiff states that the motion to strike is "clearly void of merit," it "does not deny, and will not mislead the court by doing so, that in several instances the affiant's statements are argumentative and contain conclusionary statements."[25]

[24] Rule 56(e), Fed.R.Civ.P., provides, in pertinent part:

> Supporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .

[25] Unfortunately, plaintiff does not identify which portions he admits are argumentative or contain conclusionary statements. Thus, it is somewhat difficult to determine the extent to which U.S.S.'s contentions as to noncompliance with Rule 56(e) are disputed.

Plaintiff argues that it is not necessary to strike the entire affidavit and urges the court to disregard those portions of the affidavit which may be conclusionary or otherwise objectionable. Plaintiff has submitted with its brief in opposition to the motion to strike another affidavit executed by Mr. Dobbins. He states that together these affidavits indicate that the affiant "is as knowledgeable as any person in the ready-mixed concrete business" and further show that there was a close comradery between producers in that industry so that they "became personally aware of virtually every aspect of each other[']s business."

[20, 21] An affidavit submitted in connection with a summary judgment motion is subject to a motion to strike if it does not measure up to the standards of Rule 56(e). 6 Moore's Federal Practice ¶56.22 (1974). While the court may strike or disregard the inadmissible portions of such affidavit not in conformity with the rule and consider the rest of the affidavit, the entire affidavit may be disregarded if inadmissible matter is so interwoven or inextricably combined with the admissible portions that it is impossible, in the practical sense, to separate them. *Id. And see* cases cited at *id.* nn. 49-51.

In the instant case, while plaintiff's Counterstatement of Material Facts in opposition to the summary judgment motion is quite a contrast to U.S.S.'s Statement of Material Facts, the statements in the latter are not specifically disputed in the Counterstatement. The motion for partial summary judgment presented numerous questions of law; for the most part it did

not address itself to insufficiency of proof. In ruling on the motion, the court granted certain portions thereof based on facts which were not in dispute. Other portions were denied as the court found that the contentions of law relied upon by U.S.S. were too broad and that it had not satisfied its burden, pursuant to Rule 56(c), so as to entitle it to summary judgment in its favor.

The court does not feel that it is necessary to strike the affidavit of Mr. Dobbins, which was filed on January 31, 1975, at this time. As the material in that affidavit did not warrant denying such portions of the motion as were granted, and as it was not the ground for denial of other portions of the motion, a ruling is not now required.

[22] While in some cases a request, pursuant to Rule 56(g), for reasonable expenses which the affidavit caused the other party to incur might necessitate a ruling on the motion to strike, the court does not feel that the request of U.S.S. for such expenses necessitates a ruling on the motion at this time. Rule 56(g) authorizes an award of such expenses when it should appear to the satisfaction of the court that "any of the affidavits presented pursuant to [Rule 56] are presented *in bad faith or solely for the purpose of delay.*" (Emphasis added.) The court finds that the record herein does not provide sufficient support for a finding of bad faith or purposeful delay to warrant a Rule 56(g) award of expenses.

Accordingly, the motion to strike the January 31 affidavit of Mr. Dobbins is denied at this time.

This denial, however, does not constitute a ruling or indication that the affidavit, or similar statements by the affiant as a witness, would be admissible at trial. Further, it does not constitute a ruling or indication that it is proper for a party to submit a new affidavit after a motion to strike to show that the affiant is competent to testify as to the matters in the first affidavit. Rule 56(e) states that the affidavit submitted in support of or in opposition to the motion for summary judgment, rather than a subsequent affidavit, "shall show affirmatively that the affiant is competent to testify to the matters stated therein."

In sum, the court has today granted in part, denied in part the motion of defendant United States Steel Corporation. It has denied at this time its motion to strike the January 31, 1975 affidavit of Mr. Walter B. Dobbins.

It is so ordered.

Appendix C

Section 1 of the Sherman Act, 26 Stat. 209 (1890) as amended 50 Stat. 693 (1937); 69 Stat. 282 (1955), 88 Stat. 1708 (1974), 15 U.S.C. § 1 (1975).

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or

corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 38 Stat. 731, § 4 (1914), 15 U.S.C. § 15 (1952).

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

U.S. Const. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law.